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Chapter 6

Contract in the Far East – China and Japan

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I. TRADITIONAL CONTRACT LAW IN JAPAN AND CHINA

D. F. Henderson and P. M. Torbert*

A. INTRODUCTION

1. *Common tradition of China and Japan.* – In traditional China and Japan written agreements were used extensively in commercial transactions and in social relations. These were not mere oral agreements that inevitably cemented even illiterate societies together and made social life possible. Farmers and merchants in a variety of recurring transactions developed standardized forms to reduce routine agreements to writing. Many of these agreements were formally witnessed by relatives, signed by sureties, and sealed by local officials, who often retained copies for the group records and for future reference in case of trouble. Much of this popular practice constituted a means of *social* governance, beneath the level of official or legal concern (*infra* s. 7, 8).

We limit our treatment of traditional China and Japan to the Ch'ing (1644–1911) and Tokugawa (1603–1868) periods, respectively,[1] and focus on the fully developed practices toward the middle of the 19th century. As the mature practices of the traditional regimes, these practices provided the context for the 20th-century receptions of legal codes from EUROPE that created a new law of contract. The diversity in transactions from place to place in both countries is such that we can deal only with major themes and dominant practices. Both China and Japan have had long literate traditions, and much which could be learned from voluminous primary sources (documented agreements) is still unstudied and unknown. Likewise, aspects of commercial and official practice are still controversial among the few pioneering scholars interested.

Japan has shared much of China's unique literate culture. Chinese ideographs, dating from many centuries before Christ, were borrowed in the early centuries after Christ for use in the Japanese system of writing. An extensive reception of the T'ang (619–906) codes (*ritsuryô*) from China was undertaken in the 700's by the Japanese imperial court, then situated at Nara. Next came neo-Confucian ideas of family and governance; these too were adapted to Japanese social and political life, along with wet rice culture and literature, art, and strands of other philosophies and religions. Even during Japan's isolation in the Tokugawa period, Chinese influence was felt in the shogunate and in daimyo domains.[2] So, despite significant differences, the two traditions share a common Chinese core, a core evident in their uses of agreements. This distinctive and time-tested cultural core persisted and, in the late 19th and early 20th centuries, conditioned the reception of contract law from the EUROPEAN codes. Contemporary observers assess the lingering effects of tradition in various ways, but nearly all recognize the importance of tradition in understanding the present day scene.

2. *Problems of comparability.* – How to relate the traditional social uses of agreements from a wholly different era and culture to the WESTERN legal institution of contract is a question both difficult and subtle.[3] Unthinking reification of our latter-day WESTERN legalisms and seeking their inchoate forms in early China and Japan – or using the terms of justiciable law to discuss Chinese or Japanese administration of justice – are bound to be more confusing than edifying.

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[1] For prior practice, see *Kakinuma*, Kôdai keiyaku-kô: *Nihon Daigaku Hôgakkai* (ed.), Hoseishi-gaku no shomondai – Fuse Yaheiji Hakushi kôki kinen ronbun-shû (Tokyo 1971) 43–54; *Hiramatsu* 34; *Nakada*, Shihô 31 (for ancient *teuchi* practice).

[2] See *Henderson*, Chinese Legal Studies in Early Eighteenth Century Japan – Scholars and Sources: 30 J.Asian Stud. 21–56 (1970); and *idem*, Influences.

[3] Some have suggested that, indeed, the very "idea of law" was lacking in traditional China; political and social behavior are said to have resulted from interpersonal forces of moral derivation, rather than from external, imposed rules. See *Needham*; *Granet*, La pensée chinoise (Paris 1934) 457; *cf.*, *Northrup*, The Mediational Approval Theory of Law in American Realism: 44 Va.L.Rev. 357–359 (1958), seeming to characterize as "law" some of the same things *Needham* discusses.

If we are to understand clearly the functioning of traditional Chinese and Japanese agreements in their own milieu, we must focus more directly on local formulations of the place and period. Once the indigenous formulation is grasped, the difficulty remains of describing it without distortion with English words colored by another conceptual world. Many major conceptual dichotomies, which routinely (even subconsciously) structure our current legal analysis were not operative in the Ch'ing or Tokugawa "legal" thinking (*e.g.* law/morals, law/administration; administrative/judicial; public law/private law; right/duty; criminal/civil; and procedural/substantive). It is critically important to understand why these classifications were not central to Chinese or Japanese political thought. Clearing away our own conceptual impediments is a rather backhanded methodology for addressing China and Japan, but is better than the past habit of not doing so.

In both China and Japan shallow government (authoritarian but not totalitarian) was not only a fact but a preferred policy; some observers would add that this form of government had its own merits. Buttressed by orthodox neo-Confucianism, rulers maintained public order in exchange for popular support through taxes. Unlike the ENGLISH royalty and the common law, these regimes did not seek to expand their control to include popular transactions or private disputes. These were left to morality and custom; families, clans, guilds, and villages were encouraged to mind their own affairs socially below the level of central governance, all in accordance with strict Confucian moral duties, well known in the entire populace. This "delegation" of much popular governance to intimate circles whose members knew and cared about each other had merits, not the least of which were minimal bureaucratic intervention and relative ease of fact-finding.

In the governance of these societies, there was only administration (as opposed to justiciable law); the "individual" was not an object of that administration (or administrative "law"). Individuals did not think in terms of imperial or shogunal "right", which is a WESTERN legalism; group leaders were objects of central administration as heads of the family, village, or other groups. But these leaders had no rights *vis-à-vis* their superiors; they had only duties to superiors and authority over their groups. As an old Chinese proverb has it: The rulers have law, the folk have agreements.

"Contract"[4] is a WESTERN legalism, a creature of our justiciable, private law system dependent on separation of courts (and judges) from administration. Modern justiciable law implies substantive civil rules which confer rights enforceable in lawsuits brought by individual plaintiffs in courts that are independent from the administration and are presided over by professional, neutral judges; guided by law, they observe procedural requisites, screen evidence, find facts, and render legally correct judgments. These judgments are subject to appeal and grant remedies (specific performance, damages, or the like) that are enforced by the state (again on plaintiff's motion) if not performed voluntarily. All this is largely alien to traditional China and Japan prior to 1900.

When Chinese officials heard a dispute over an agreement, they saw it largely in terms of administrative concerns and criminal implications. The same was true of Tokugawa officials who heard such disuptes only in case of diversity of jurisdiction or conflicts between local authorities (*infra* s. 16). Otherwise, officialdom had no interest in intervening, and stood rather aloof. In contemplating this comparative lack of most of the legal apparatus of justiciable contract, we should remind ourselves that, even here and now, lawyers usually take their justiciable law much more seriously than do their contracting clients. The parties to an agreement are, prospectively at least, performance-minded and interested in a sustained relationship. They are impatient with the implicit negativism of clever clauses and the lawyer's emphasis on prospective victories in court.

Similarities in the Chinese and the Japanese traditions should not obscure the differences; there were differences, important ones. So to give proper attention to these distinctive features, we describe Chinese and Japanese legal cultures and institutions related to contract sep-

[4] We shall use "contract" to refer to modern WESTERN usage and "agreement" to refer to non-justiciable promises. *Cf., E. Gerli & Co. v. Cunard S. S. Co.*, 48 F. 115, 117 (2 Cir. 1931) where Judge *Learned Hand* states the distinction in a typical lawyerly fashion: "...But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes."

arately, beginning with Japan, which, by 1843 may have, through its formulary system, come closer than China to WESTERN contract. Salient comparative points are considered at the end of this subchapter (*infra* s. 38–40).

B. CONTRACT PRACTICES IN TOKUGAWA JAPAN

i. *The Fundamentals of the System of Justice*

3. *The Tokugawa regime as a context for contract.* – The peculiar features of the shogun's regime shaped the administration of justice and the use of agreement in Tokugawa society. The regime, based on a rice economy was a highly complex, isolated, feudal system under a symbolic imperial court. The shogunate power rested upon four key policies: (1) monopolization of the prestige of the Imperial Court in Kyoto; (2) control of the daimyo;[5] (3) prevention of internal intrigue; and (4) isolation to minimize the threat of foreign influence.

Long before the leaders of the Tokugawa became the *de facto* rulers of Japan (1600–1868), the dualism of an emperor formally reigning in Kyoto while a shogun, as the emperor's chief military officer, actually ruled from Edo[6] (or elsewhere), had become a pattern of Japanese government. In Edo, there were two distinctive features of Tokugawa centralized feudalism not generally found in mature EUROPEAN feudalism: (1) garrisoned vassals (retainers of the shogun and of the daimyo) were all permanently withdrawn from the land and garrisoned in castletowns and thus were, like bureaucrats, dependent on stipends payable in rice; (2) the thousands of villages (*mura*)[7] of the countryside became the smallest units of enfeoffment to warriors in both the shogun's and the daimyo's lands. This meant that the villagers, disarmed but alone on the land, were not feudally organized *within* the village. They were allowed to govern themselves to a considerable degree so long as taxes were paid, order maintained, and crimes suppressed.

Bearing in mind that the shogun's direct holdings (not allotted to tenants; demesne in ENGLISH terms) was only about one seventh of the country and that the shogun, as well as the 260 daimyo, left most matters of village governance to the villages themselves, where roughly 85 percent of the populace resided, the shogunal system seems to us today extraordinarily decentralized. Central administration was both spotty and shallow in its bite, though wholly adequate to maintain Tokugawa power and dominance, since only the two-sworded warriors garrisoned in the castletown had weapons.

A third major feature of the regime must be highlighted because of its eventual impact on the use of agreements in commerce. The shogun controlled the major cities interspersed

[5] Some basic facts may be helpful to nonspecialists. By definition, the daimyo were the shogun's top layer of vassals each with assessed production capacity of at least 10 000 *koku* (about 50 000 bushels) of rice. The second layer were bannermen (*hatamoto*), with fiefs (or stipends) of less than 10 000 *koku*. The daimyo collectively (about 260) held about three fourths of the production capacity for rice, the shogun, about one seventh, and the bannermen the rest. Thus, rice was the chief measure of power, and was, initially, a unit of exchange and payment to vassals as well. Only 22 daimyo had sufficient power to be potentially threatening to the shogunate, and only about 120 had castles.

But administratively important is the fact that they all had plenary powers to administer justice in their fiefs (*han*). Many of the 5 000-odd shogunal bannermen also were enfeoffed lords with villages of their own, including authority to administer justice. In the complexity of literally hundreds of feudal jurisdictions, the shogun had jurisdiction over cases straddling fiefs (*i.e.* plaintiffs suing defendants from a different fief), called diversity cases (*shihai chigai*). In addition, the shogun's justice also prevailed directly in his demesne (one seventh of Japan) and the major cities. Such was the complexity of the regime. For more details, see *Henderson*, Conciliation I ch. 2 and 4.

[6] Edo was the seat of the shogunate (1603–1868); it was renamed Tokyo after the restoration of the emperor, who moved from Kyoto to reign in Tokyo, occupying the shogun's castle there. Tokugawa power was based on conquest, and, after victory, the heads of the Tokugawa house became shoguns and hereditary chiefs of the feudal system for 15 generations. Feudal devices (fealty and enfeoffment) were used to bind the major military contenders (*tozawa* – daimyo) to the Tokugawa. The highest levels of conquered potentates (also allied daimyo, called *fudai*) were thus structured in a complex system by ties quite similar to mature EUROPEAN feudal institutions, which, incidentally, were not found in Ch'ing China.

[7] There were perhaps 150 000 of them; see *Smith*, Land Tax 8.

throughout the four main islands.[8] In addition, several of the daimyos' castletowns were significant outlying commercial centers of about 100 000 people.[9] These urban centers of government, filled with garrisoned retainers, soon began to nurture a thriving internal commerce conducted by two status-groups of increasing importance: merchants and artisans. In all, about 15 percent of the population was urban (5 percent warriors; 10 percent merchant/artisan). With the growth of a money economy, many merchants had become wealthy by the 19th century from substantial dealings involving agreements among themselves and with the warriors, who by this time had largely turned into governing bureaucrats.[10]

Orthodox neo-Confucian philosophy inspired shogunal regulations that shaped the whole administrative system into a system of castes in descending order of Confucian merit: warrior, farmer, artisan and merchant. Ironically, agreements could sometimes be made in the later period whereby a merchant bought warrior privileges and status.

Likewise the autonomous villages used agreements extensively in intramural dealings, and indeed in intramural governance. It is convenient, therefore, to distinguish between exchange contracts, involving commercial transactions, and cooperative contracts, involving communal agreements.[11] We shall deal separately with villagers' agreements and merchants' town-agreements because of differences in content, function, and modes of enforcement.

But first it is useful to characterize (in modern legal terms, inept though they be) the overall administrative system as a context for these contractual practices; in doing so, we address: (1) the village practice in the shogun's own domain (demesne), about one seventh of the rice lands; (2) the shogun's practice in overseeing conflicts of daimyo jurisdiction in diversity cases; and (3) commercial practices primarily as found in Edo and Osaka. In the largely commercial practice in Edo and Osaka, the shogunate developed a formulary system for commercial petitions of special interest to contract; this system is explored *infra* (s. 16–23). Internal administration of justice within the daimyos' domains is not considered; the subject has been little studied as yet and practices were, in any case, too numerous and diverse to deal with here.

4. *Characterization of the legal system.* – Decentralization of the administration of justice was not so much a result of power balances between shogun and daimyo (or between local deputies, *daikan*,[12] and villages in the demesne), as a policy preference of the shogunate, which preferred not to be burdened with affairs within the daimyo fief or between villagers intramurally. The position was, implicitly, that these entities should and could manage their own affairs, once the overlord's taxes (or services) were dispatched to him. In WESTERN terms, the jurisdiction ran with the daimyos' lands. True to feudal conception, the law-of-the-land was the land law. However, the shogun did not cherish the ambition, so pivotal in the common law growth of medieval ENGLAND, that the ruler's writ run throughout the entire land. Shogunal law dealt only with feudal fief holders (and in the demesne, only with headmen of the villages through the shogun's deputies). Though the penetration of shogunal administrative fiat was shallow, it was entirely effective for maintenance of power; for two and a half centuries the regime was comfortable with this balance between government and society.

In view of this balance, individuals' private claims against each other were mere social concerns; the government in effect had no private law, because individuals had no claim as a matter of right – no power to bring a suit and control its prosecution before the shogunate. Indeed, the shogun had no separate judiciary, only officials (*bugyō*) who handled administrative matters and police functions; these same officials also handled private claims in the limited instances enumerated above, but as a matter of grace, not right. When individuals' claims

[8] Edo, one of the largest cities of the world in 1800 and the major center of consumption; Osaka, the primary supply and distribution center; Kyoto, the imperial capital; Nagasaki, the only official port of access for foreign trade limited to Dutch and Chinese; and others.

[9] *E.g.* Kanazawa, Hakata, Kagoshima and Sendai.

[10] Warriors not employed in the administration had become supernumeraries, without battles to fight and often underemployed and underpaid.

[11] See *Bohannon*, Social Anthropology (New York 1963) 155 for the distinction between contracts of exchange and contracts of cooperation.

[12] In the shogun's demesne, there were about 40 deputies, all of bannermen rank; each administered shogunate rice lands of about 50 000 to 100 000 *koku*, five to ten times that of a minimal daimyo. They were, of course, shogunal agents, not enfeofees.

were heard they were handled administratively, without appeal, and only if the petition fitted within a formulary system devised and administered by clerks. These formulas blurred all substantive and procedural distinctions; the decision as to procedures also determined the remedy (*infra* s. 21). Though a distinction between officially-initiated proceedings (*gimmimono*, criminal) and plaintiff-initiated proceedings (*deiri-mono*, civil) was recognized by the officials (*bugyō*), civil matters often lapsed into criminal treatment and wound up with the imposition of penalties on the defendant and, indeed, upon the plaintiff, if he were found to have misbehaved. Conversely, lesser crimes could be, and often were, resolved by civil settlement.

Orthodox Tokugawa political philosophy was an adaptation of neo-Confucian thought. The philosophy coalesced law and morals. The lord ruled as a wise and moral exemplar; subordinates had no rights but superiors had moral duties to treat subordinates rightly. In such a system, law had a role only in cases of culpable failure of morality: law was exclusively penal law to deal with moral failures of duty, not to vindicate rights from below at the behest of the populace. Penal law was, of course, always imposed from above; prosecuting witnesses were at most auxiliary. Law did not mediate between equals, nor punish a wayward official except when invoked by his superior. Confucianists did not believe with *Lord Acton* that "power corrupts, and absolute power corrupts absolutely."[13] They believed rather with *Plato* that virtue and wisdom should and did rule, among naturally unequal people.

Is then contract a viable topic in a village context bereft of justiciable law and without a judiciary or bar to assist plaintiffs in enforcing rights under private law? Actually, village agreements and their uses provide interesting analogues well worth reviewing because, from all we can determine in retrospect, these agreements seem to have been socially quite effective without law. Town agreements also had an importance in commercial life quite beyond legalities, but commercial claims arising from town agreements were, by the mid-19th century, thrust upward for shogunal treatment. Had the regime not collapsed perhaps an indigenous law of contract would have emerged.

ii. *Non-Justiciable Agreements in Village and Town*

5. *The village as a context for agreements.* – Containing fully 85 percent of the nearly 30 mio. Japanese, the rural, rice-producing village (*mura*) was first a community.[14] Villages were numerous and small, each with a few hundred people. Each was comprised of families, their houses, fields, and irrigation systems. The village – usually the smallest unit of enfeoffment[15] – was a peculiarly basic, self-contained and, to a considerable extent, autonomous[16] unit of the society, of the economy, and of feudal administration. The headman (*nanushi*) was invariably literate; he kept prescribed and remarkably detailed records and registries of people, land, production, and taxes.[17]

Explicit policy and meticulous registries severely restricted, both free movement and social mobility between farmer, merchant, and warrior statuses. Village ingress and egress were limited by shogunal regulations – designed to keep taxpayers at the task of raising tax rice, by the village itself, and by the scarcity of tillable land. These factors rendered the villages exclusive, stratified groups in which typically (or ideally from the standpoint of overlords' policy) families, generation after generation, lived out their lives working in the same place with the same neighbors and associates. Such conditions led to a sociality and sociability inconceivable in more mobile circumstances. By the same

[13] See The Oxford Dictionary of Quotations (ed. 3 Oxford, New York a.o. 1979) 1.

[14] Village communal governance was more a matter of sociology or social anthropology than law; agreements were important to its process, as noted in the text. The difficulties of bridging anthropological "law" and justiciable law have been discussed by the writer before; that analysis cannot be carried any further here; see *Henderson*, Conciliation I 55–56.

[15] Some larger villages were split between two (or sometimes even more) petty feudal lords and called *aikyû-mura*. Especially in the Kinai (Izumi, Kawachi, Settsu, Harima and Yamato), *aikyû* villages were numerous. A simple description of the village system may be found in *Ishii Gaisetsu* 399, 440 and 444.

[16] The degree of autonomy is controversial. See for the issues, *Hayashi (Ode)* and *Hayashi*, Review of article by *Uesugi*, Kinsei sompô no seikaku, Minshûshi kenkyû (No. 7) 22 (1969): 21 Hôseishi kenkyû 226–228 (1971).

[17] See pictures and descriptions of tax surveys in *Ishii*, Edo jidai mampitsu (Tokyo 1959) 32; for details of the shogun's tax collection system, see *Ohira*, Edo bakufu daikan no ichi-kôsatsu: 36 Hôgaku 1–55 (1972); also *Ishii* (*supra*) 216, 223, 275, 278 (details of the accounting records).

token, these conditions made intramural agreements serious social commitments, and rendered fact-finding in case of breach a relatively simple matter among people who knew each other and all of one's dealings.

6. *Shogunal restrictions on village contracts.* – Later in the Edo period, the role of land and rice diminished somewhat due to increasing social and economic intercourse. The use of money and cash cropping spawned village commerce and caused more tenant farming; the extended family, as a unit of rice culture and source of labor, was disintegrating under pressure of growing market forces and magnetism of urban centers.[18] But the early dependence of the shogun on the rice tax paid in kind and on rice as a measure of wealth and power had led to several shogunal policies that even in the 19th century continued to influence the form and substance of village agreements. *E.g.* the standard unit of enfeoffment (within the *han*) remained the village whose integrity was thus preserved. Standard documents developed to embody these enfeoffments. Farmers were prohibited from migrating off the land and from selling it.[19] But land was in fact not infrequently sold, usually under dire circumstances; standardized documents[20] developed to implement fictitious loan/mortgage/default devices to enable owners to evade the prohibitions by alienating land through foreclosures. Shogunal prohibitions on the sale of persons[21] and initial limitations on the lengths of service for servants[22] shaped the terms of employment agreements.[23] Farmers were officially encouraged to be frugal, which surely to a degree restricted trade in luxury items. Though discouraged from engaging in other activities, farmers in fact did escape to town, later in some numbers, in response to wage opportunities and labor demands of the towns and cities. Banishment was a major penalty and banished convicts became one source of contract labor in the cities.

7. *Village governance and autonomy.* – The overlord's regulations, if precise and intensive in tax and criminal matters at the village level, were not intended to reach the farmers' transactions among themselves; the village was to care for its own and see that its members performed their duties to each other in accordance with the village's own rules and customs. Not only was the village competent, it was required by overlord law to regulate through its own headman and elders its internal affairs and dealings between villagers.[24] Much of this self-regulation was embodied in agreements. The fundamental principle of autonomy (in the sense of the village's independence) thus profoundly affected the uses and functions of agreements. In case of breach, the principle left the obligee with only *social* enforcement by villagers. In the event of dispute, settlements were in their turn embodied in similar agreements. Agreements of these sorts became a common means of governance.

The system discouraged civil petitions to superior authority above the village level. This discouragement flowed from the overlord, as well as from the villagers themselves. When a petition to the shogunate for relief did occur, it seldom went beyond the first instance (deputy); as a result, the deputy was the first, as well as final, "court" of appeal for villagers. Disputes reaching official channels outside the villages were limited to three types: (1) village suing village, (2) a petitioner from one village against a defendant in another village, or (3) intramural disputes that became forceful disturbances uncontainable in the village and thus were thrust upon the deputies. Sometimes disputing villagers had different overlords (the so-called diversity cases); such cases went directly to Edo (or Osaka) on endorsement of the deputy or overlord.

This brief sketch helps one to understand the context and use of formal agreements in the villages, containing 85 percent of the popula-

[18] *Smith*, Origins 173 emphasized the changes in family resources over the long term.

[19] *Kujikata Osadamegaki* II art. 30 (Engl. transl. *Hall* 713). See *Takeyasu*, Tahata eidai baibai kinshi-rei to sono igi (Osaka furitsu daigaku keizai kenkyû no. 16 (Osaka 1959); and review by *Ishii Shiro*: 12 Hôseishi-kenkyû 256–257 (1961).

[20] See *Haruhara Gentarô*; also *Harafuji*, Shōsho 100 n. 2, for citation to Edo-period form books for drafting proper documents. See also *Kaneda*, Koyôhô no. 7–10.

[21] *Maki*, Jinshin deals with the sale of persons.

[22] See *idem*, Koyô for employment agreements; and see *Kujikata Osadamegaki* I art. 72 for repeal of the ten-year limit.

[23] See *Henderson*, Village "Contracts" 149–150 for an example of "service" contracts amounting to a sale of a daughter.

[24] See *Maeda*, Ryôshuhô-jô 101; *Fuse*, Mura hachibu no soshô: 23 Nihon hôgaku no. 3, 376–389 (1955).

tion. Of course, all rural villages were not the same. In the late Edo period, each had its own customs[25] and some, especially in the vicinities of Osaka[26] and Edo, had their own commercial activities of some scope, transcending village borders. Many villages had special problems, internal and external, arising from their special history, location, size and social composition.[27]

8. *Village agreements as intramural governance.* – Some Tokugawa village agreements were used to document simple deals – sales, loans, and employment – between villagers. But others were multiparty instruments for cooperation and governance or village management. Written and filed with the village officials in standard form and phraseology, they were a formal type of social communication – a way to integrate purposes, or organize efforts, to store information and to achieve understanding. This kind of consensus had an efficacy attainable only because of the peculiar nature and role of the village in the polity described above (*supra* s. 5).

As noted, the overlords generally denied the villagers access to the courts for enforcement of private or civil law, except in egregious cases verified by the headman's seal;[28] in diversity cases, verification by the overlord's agents was required as well. Such petitions as there were to higher authority would have been first subjected to intramural or inter-mural conciliation efforts. Village sanctions such as ostracism[29] might even be used against uncooperative parties, in an effort to obtain agreements to settle. Or, reverse tactics might be used by threatening to bring a suit, in order to bring an opponent in line.[30]

Consensual governance in the village took several forms. Some agreements had a constitutional importance. *E.g.* several agreements[31] are known that determine, in a constitutive sense, the method of selection and the powers of the headman. Others[32] redefine official duties and rights of the village members. Intervillage agreements, related to commons or boundaries (or related taxes), can also be regarded as constitutive in a broad sense.[33] Only when consensual solution failed were village boundaries set by superior authority.[34]

Many legislative[35] functions were also carried out by this sort of documented consent, *e.g.* regulation of transport[36] and use of commons.[37] Budgeting and auditing problems were also handled by agreements,[38] as were fiscal difficulties encountered by the village in financing tax payments[39] or village expenses.[40] Village agreements were also used to finance social wel-

[25] Many customs for documenting agreements were collated and recorded by travelling survey teams sent out by the early Meiji government. The surveys were later published. See *Takimoto Seiichi* (ed.), Minji [Classified collection of civil customary practices], originally compiled by the Ministry of Justice (*Shihôshô*) 1877; see also *idem* (ed.), Shôji [Classified collection of commercial customary practices], originally compiled in 1883–1884. These materials are also found in Nihon keizai taiten vol. 49 and 50. For works in English, see *Wigmore* (ed.), I (Introduction), II (Contracts – Civil Customary Law), IV-A (Contract – Commercial Customary Law). These volumes are based on work started by *Wigmore* in 1890 and partially published in 20 Trans.As.Soc.Japan (ser. 1) (1892). In all, ten volumes were projected for publication by the University of Tokyo Press based on manuscripts, some of which were edited originally in the 1890's, others in the 1930's and early 1940's under the auspices of the *Kokusai Bunka Shinkôkai*. Only nine were published, because the Glossary was abandoned.

[26] See *Kansai Daigaku Hôseishi Gakkai and Kansai Daigaku Keizai Gakkai Keizaishi Kenkyû-shitsu* (ed.), Osaka shuhen no sonraku shiryô III (Shomon-shû, mura-yakunin) (Osaka 1956).

[27] See *Kamata* 122; also *Henderson*, Village "Contracts" (agreements no. 9, 15 A, 15 B, 42 and 45). This is a source book containing 53 translated agreements with auxiliary documents. They were selected to represent reasonably typical examples of agreements, dealing with 15 types of village transactions regularly encountered.

[28] *Ishii Ryôsuke* suggested in his review of *Henderson*, Conciliation: 83 Hôgaku kyôkai zasshi 1369–1390 (1966), 2 L.Japan 198–224, 216 (1968), that the requirement that the headman seal a villager's petition to the deputy was only to identify the petitioner as registered in the village, not to make the headman's approval necessary to suit. This may be, but given the acknowledged duty to conciliate, it amounted in practice to much the same thing.

[29] See *Maeda*, Ryôshuhô-jô 101.

[30] *Henderson*, Village "Contracts", agreement no. 50.

[31] *Ibidem* no. 39, 40 and 41.

[32] *Ibidem* no. 43 and 46.

[33] *Ibidem* no. 2, 68, 8 and 10.

[34] *Ibidem* no. 9.

[35] *Maeda*, Sonpô.

[36] *Henderson*, Village "Contracts", agreement no. 45.

[37] *Ibidem* no. 12.

[38] *Ibidem* no. 42 A and 42 B.

[39] *Ibidem* no. 21 and 23.

[40] *Ibidem* no. 20.

fare and relief measures in a variety of circumstances[41] and sometimes even to refinance village temples.[42]

In the judicial sphere (conciliation and dispute settlement), agreements played an even more important role in governance; settlements negotiated by village mediators and documented by agreement (*wabijô* and *sumikuchi shômon*) for future guidance resolved intramural conflicts to such an extent that shogunal intervention was quite secondary.[43] Even after shogunal intervention, official conciliation and consensual settlements were the rule in "court" as well.[44] These in "court" settlements were documented by formal agreements.[45] Even the infrequent judgments (*saikyô*) took the form of an agreement accepted, however reluctantly, and sealed by both parties and their functionaries.[46] Even criminal matters were compromised by agreements (presumably illegally) at the village level and kept thus from becoming a dreadful public matter with the overlords.[47]

9. *Transactional agreements in the village.* – Alongside cooperative agreements and their role in village governance, formal agreements were, of course, common in routine transactions between villagers. As noted above (s. 8), they often followed standardized forms gradually imposed by the shogun's formulary system for enforcing claims. Most basic were agricultural agreements concerning water rights,[48] land mortgages (or sales),[49] employment,[50] boundaries,[51] right-of-way,[52] use of commons,[53] and land leases.[54] The most frequent forms of the later commercial agreements were loan agreements with interest, either unsecured or secured by pledges, mortgages or other collateral.[55] Other loan agreements (*e.g.* for disaster relief or from a temple) bore no interest.[56] Employment agreements were standardized and formal; they provided guarantors for servants, who were often hired out on extended terms for wages paid in advance to the servant's superior (or parent) in distress.[57]

In family relations, formal agreements governed matters such as dowry, succession to the headship of the house, retirement, adoptions (common to preserve a "house" from dying out) and marriage arrangements between the bride's and the bridegroom's houses.[58]

It is important to remember that villagers seldom dealt with strangers, at least without mutually known go-betweens as guarantors. Continual discussing, communicating, and reporting of transactions within a well-acquainted, small, circumscribed, immobile group generally resulted in a village consensus – a means of governance and a way of life. From working with village documents and vicariously experiencing the underlying activities one has a sense of profound internal social (as opposed to overriding legal) efficacy in the process. Village problems were such face-to-face personal matters and their solutions so consensual that, when describing the process, one almost instinctively puts the ENGLISH legal terms in quotes to alert newcomers to the obvious lack in Tokugawa times of justiciable law, which modern WESTERN lawyers live and breathe.

10. *Draftsmanship.* – To induce performance and avoid disputes arising out of village agreements, much ingenuity was shown in drafting and documentation; a special effort was made by creditors to create devices for self-help[59] or

41 *Ibidem* no. 14, 15, 16 and 22.

42 *Ibidem* no. 17 and 18.

43 See *idem*, Conciliation I 128.

44 See *ibidem* I ch. VI for examples of extensive negotiations, after "trial" started, conducted by the officials themselves.

45 *Henderson*, Village "Contracts", agreements no. 2, 8, 9, 10, 36, 46 and 48.

46 *Nakada*, Jitsuroku, esp. the "market case" at 878; and see another example of a "judgment" (*saikyô*) in *Kukita* 192–203.

47 *Henderson*, Village "Contracts", agreements no. 49 and 50.

48 *Ibidem* no. 1 and 2.

49 *Ibidem* no. 3–7.

50 *Ibidem* no. 30, 31, and 32.

51 *Ibidem* no. 8 and 9.

52 *Ibidem* no. 13.

53 *Ibidem* no. 12.

54 *Ibidem* no. 10 and 11.

55 *Ibidem* no. 19–27.

56 *Ibidem* no. 14–18.

57 *Ibidem* no. 32 is such a case; see generally *Maki*, Koyô.

58 *Henderson*, Village "Contracts", agreements no. 33–38. See generally *Ôtake*.

59 See *Hiramatsu* 33. See also *Kaneda*, Keiyaku. Although contracts for creditor's self-help in case of breach were improper by the late Tokugawa period, such contracts did exist. *Haruhara*, Kikimimi 'hasannin' monjo: 17 Hôritsu no hiroba no. 5, 50–52 (1964). Note the functional similarity of the witnessing and recording done by the village headman and the modern CIVIL LAW system of notarial deeds, upon which judgment for a sum certain may be entered without further proof. For the Japanese provisions, see *Kôshônin-hô* art. 35 and 36, and CCProc. art. 559–560.

to provide for substitute performance in case the debtor defaulted for inability to pay. The essential facts of transactions were acknowledged, attested and recorded to avoid inconsistent assertions later. Proof problems were not only reduced by the documented agreement itself but also by the fact that the parties, their go-betweens, witnesses, sureties, and officials all knew each other and most of each other's property and dealings. If the debtor later could not pay or perform, then there were usually third parties indisputably obligated as guarantors, and they too were constrained by the same communal pressures to perform, if possible.[60] Indeed, the outstanding feature of legal draftsmanship, clear from these Tokugawa village documents themselves, is the skill with which such devices were employed, perhaps because external legal remedies were thought to be undesirable, or were unavailing.

11. *Social enforcement in the village.* – Almost all contract enforcement thus occurred in the village, and it was not legal enforcement in lawyers' usage. Enforcement was rather through psychological and communal pressure, and by conciliation of the sort that, in the past at least, anthropologists have dealt with more comfortably than lawyers.[61]

Amicable settlement by conciliation would depend on finding what, short of full performance, would be acceptable to the creditor and within the future capabilities of the embarrassed debtor. If the debtor were dishonest, tricky or mean, the village might punish him by a kind of customary ostracism or the like.[62] Village sanctions were very serious for the immobile villager in the confines of his little community.[63] The sanction lent a solemnity to promises, which contract can scarcely match in a society of mobile individuals dealing often with relative strangers with full rights to move away from the problem, or to commit a breach and wait to be ordered by a judge to pay damages.

But the parties were not left to their sole devices; within the village, the households and five-man-groups (neighbor organizations) through their spokesmen as well as the village officials (*sanyaku*) became involved before a dispute burst the bounds of the village. Indeed overlord policy throughout Japan encouraged the village through its elders and headman to settle disputes. Most disputes were settled by negotiation and conciliation (*atsukai*) and then documented by agreements.[64]

Only rarely was internal conflict irresolvable by the village and its mediators. Such cases had administrative and criminal import, so petitions from villagers went to the local deputy,[65] duly verified by the headman. Deputies were under the authority of the Finance Commission in Edo, but again claims did not go beyond the deputy, unless there was a disturbance,[66] or a

[60] *See Wigmore* (ed.) II 6–10, saying not all sureties (*shônin*) were actually liable if the principal debtor defaulted; it depended on the agreement's wording which varied by custom from place to place. *Idem* III 20 (no. 14) says sureties are not liable, if the principal is convicted of crime and thus unable to pay. *Ishii Ryōsuke* VII 325 explains the difference between witness and guarantor in Osaka and Edo.

[61] See *Henderson*, Conciliation I ch. III.

[62] *Maeda*; and *Fuse*, *supra* n. 24.

[63] *Henderson*, Village "Contracts", agreement no. 46.

[64] *Ibidem* no. 46, 48 and 50.

[65] Concrete studies of deputies' administrative handling of petitions are still scarce; see *Kukita* 149–255. One case (149) is an interesting example of a dispute over reclaimed land being escalated into a petition against the headman. *Ishii Ryōsuke* promises treatment of deputy proceedings in his next volume (IX): *idem* VIII 1. The most detail on the deputy's handling of cases is found in *Hiramatsu*, Kinsei keiji soshôhô no kenkyû (Tokyo 1960) 460. He deals with administrative and jurisdictional aspects of criminal proceedings, but, much of the material is relevant to civil matters. See also *Nagayama*, Hayakawa daikan (Tokyo 1971, 1929 ed. repr.); *Ishikawa*, Edo jidai daikan seido no kenkyû (Tokyo 1963); and *Watanabe* (ed.), Hikone-han Setagaya daikan kinjiroku (Tokyo 1961); *Murakami*, Edo bakufu no daikan (Tokyo 1970). Voluminous as these studies are, they contain relatively little on the deputies' dispute resolution functions. Other specific case studies appear here and there in the journals. *Kumazaki*, Daikan-kô: *Nihon Daigaku Hôgakkai* (ed.) (*supra* n. 1) 139–161 introduces an Edo-period manuscript, *O-daikan yoshô* (three manuscript vol.) which contains concrete information on the deputies' handling of cases.

[66] The farmer uprisings (*hyakusho ikki*) have been much studied; most were disturbances directly protesting deputy administration (*i.e.* administrative actions) but some involved divisive issues within the village as well. The pioneer work in English is *Borton*, Peasant Uprisings in Japan of the Tokugawa Period: 16 Trans.As.Soc. Japan 1–230 (1938). Three recent studies are: *Nagayama* (preceding note) 584 (instance involving a protest against an official change in the rate by which the rice tax was converted to money for payment); *Wigmore* (ed.) I 110; and *Kukita* 149 case in which villagers alleged in Edo bribery against the *daikan*'s clerk.

dispute in which the parties were villages not located in the same deputy's territory.[67]

iii. *Non-Justiciable Agreements in Tokugawa Guilds*

12. *The context of town agreements.* – Another Tokugawa setting for formal agreements was urban.[68] Throughout the Tokugawa period towns and cities were constantly growing centers of commercial activity. Most of the major towns were castletowns (*jokamachi*), which served as seats of feudal government of the shogun[69] or major daimyo.[70] During two and a half centuries of peace, these towns, originally military and governmental centers, gradually spawned their own commerce; soon they contained about 15 percent of the population, mostly retained warriors (*samurai*) and merchants (*shônin*). The *samurai* were the ruling class with elite status. The merchants, though low in status, became wealthy and powerful by providing for *samurai* needs as well as their own.[71]

13. *Nature of town agreements.* – Many kinds of sophisticated transactions grew out of this commerce; these were often quite different in device and substance from older village agreements dealing with land, rice, irrigation, water, boundaries and the like.[72] Especially in Edo and Osaka, the transactions embodied in town agreements were often large scale and could be concerned with every aspect of money, commerce, transport, employment, service, or construction. Usually the parties were both merchants, but many transactions were inter-status with *e.g.* merchants dealing with warriors.[73]

Many nominal farmers[74] became involved in urban commerce as it spread to the countryside, especially around the major hubs of Edo and Osaka. Merchants' activities provided the impetus for the numerous money suits (*kanekuji*, *infra* s. 17) which were developed for enforcement of business claims. These commercial dealings and the relevant jurisdictional rules were so intricate that official enforcement actions were required for these transactions more frequently than for village agreements grounded in communal agriculture. Often parties to money agreements had little social contact with each other: enforcement support of a higher authority provided a surrogate for communal sanctions. Hence money suits became very numerous and clogged the shogun's offices.

14. *Merchant organizations (guilds).* – By the 19th century, merchants had organized each trade – rice, wine, timber, and the like – into guilds (*kabunakama*). In both Osaka and Edo the trading practices of these guilds were highly developed.[75] Guilds were important in the informal enforcement of agreements because they regulated each trade with autonomous rules and (like the rural village) could exclude members. The guilds were also licensed monopolies and

[67] Many examples are found in the literature of two villages disputing with each other here and there, but little effort has been made so far to bring examples together in comprehensive studies of village disputes. See *Nakamura* (ed.), Takata hanseishi kenkyû (Tokyo 1971) VI 447 (two fishing villages before the deputy, *Arai*). It is nonetheless clear that such intervillage disputes constituted for deputies one of their most serious "judicial" problems, along with intramural disturbances that could not be resolved by the usually effective intramural conciliation process.

[68] By 1800, Edo was probably larger than any city in Europe; it was a city of consumption in that each daimyo – as well as thousands of their retainers and of shogunal retainers, together with the retainers' families – lived there in a kind of hotel existence away from their fiefs and source of sustenance. Osaka was a huge market that supplied Edo and other places and thus a commercial entrepôt, where daimyo from most of Japan shipped and stored rice and every other product to be transshipped to Edo and marketed. This interurban commerce became very active, and called forth both interurban sailing transport and money exchanges. The coin of Edo was gold; Osaka was silver, so the money changers (*ryôgae*) were well developed too.

[69] *I.e.* Edo, Osaka, Kyoto, Nagasaki and others.

[70] *I.e.* Kanazawa, Nagoya, Sendai, Kagoshima and others.

[71] In English, see *Sheldon*, The Rise of the Merchant Class in Tokugawa Japan (New York 1958); *Wigmore* (ed.) I 83–144.

[72] *Kobayakawa Kingo*, Soshō 529 notes that the typical villagers' (*murakata*) suit concerned land (*ronsho*), while the typical suit brought by townsmen (*machikata*) concerned money (*kanekuji*). Jurisdictional problems typically stood in the way of a rural Tokugawa villager bringing proceedings to the central Edo offices, where *kanekuji* constituted the bulk of the case load (see *infra* text).

[73] Many townsmen's suits included farmers or warriors as opponents, of course. For statistics on the number of cases filed in Edo and Osaka, see *Kobayakawa Kingo*, Soshō 8–10; see also *Kaneda*, Minji.

[74] An interesting example of a trading farmer is *Nuinosuke*, whose suit is written up in detail in *Henderson*, Conciliation I ch. 6.

[75] For guilds generally, see *Miyamoto*.

could confine dealings in their trade to members. Thus, petitions to the shogunate by one member merchant against another were normally quite unnecessary; a complaint to the guild was sufficient to obtain satisfaction from a wayward fellow member. Credit agreements were accordingly often either oral or notes recorded in the seller's daily journals and sealed by the creditor.

15. *Enforcement of agreements by guilds.* – Agreements, especially between merchants, were enforced by intra-guild discipline of great efficacy. Each guild specialized in a given product or products and operated as a monopoly with licensing authority. All dealers in a product were required to join the appropriate guild and conform to its rules. A clap of the hands consummated a deal, and to renege on an obligation was commercial suicide. The guilds became numerous and were much regulated by the shogunate.

The commercial disputes that reached the shogunal offices[76] generally did not, therefore, arise from inter-merchant dealings but rather from dealings between commercialized farmers and merchants, between merchants (lenders) and warriors (borrowers) or between parties from different villages or different wards within the cities. As noted above (*supra* s. 2) the latter suits (between parties from different jurisdictions) were diversity suits (*shihai chigai*), so called because the parties, being under the jurisdiction of different offices, could not rely on the usual intramural, intra-guild, or intra-fief processes to resolve their disputes. From the early 18th century, these disputes in increasing numbers were brought as money suits (*kaneku-ji*) to the shogunal offices in Edo and Osaka. They furnished the impetus for growth of such contract law as the Tokugawa shogunate had before the code reception at the end of the 19th century.

iv. *Agreements Enforceable in the Shogunate*

16. *Shogunal jurisdiction in village cases.* – The three features of the immensely complex system of Tokugawa administrative jurisdiction (*shihai*)[77] described above (s. 3) give us an inkling of contract enforcement from the bottom up as it would have appeared to the Tokugawa villager or townsman. For, of course, a contract right implies the possibility of enforcement on the motion of the obligee.

First, the shogunate, interested primarily in public power relations, preferred not to assume the function of adjudicating contract disputes among the folk, whether villagers or townsmen. Even in the limited areas in which the shogunate was required to settle such disputes – diversity cases and demesne cases that had escalated into disturbances of the peace –, adjudication was seen as a dispensation of grace, rather than as a doing of right between the parties. Indeed, officials characteristically acted primarily as mediators in the early stages of proceedings and accordingly normally produced a compromised result. This deliberate decentralization of the shogunate's justice contrasts sharply, as already noted, with the expansion of the King's justice and common law in ENGLAND.

Second, jurisdiction ran with the land in Tokugawa feudalism. Exclusive judicial authority to decide all civil disputes arising between parties within a single overlord's fief, of which there were hundreds in a land the size of California, was rigorously delegated to the fief holder himself (*i.e.* the daimyo, the *hatamoto*, *etc.*) with no right of appeal. In sum, the shogun eschewed disputes within the fiefs, as well as intramural disputes within his demesne.

[76] See *infra* s. 17. In English, *Henderson*, "Contracts" in Tokugawa Villages: 1 J.Jap.Stud. 51–90 (1974); and *idem*, Conciliation I ch. 4–6. In the postwar period until recently, Tokugawa civil litigation was less studied in Japan than was Tokugawa criminal prbcedure (see *Hiramatsu*, *supra* n. 65). One reason for this lack of interest may have been the intricate formulary system which includes both "right and remedy". This conjunction makes it necessary first to study the many standard transactions (over 50) which were classified as main suits or as money suits. Then all main suits were handled by special procedures and remedies, while money suits were handled by different and less effective procedures and remedies. The pioneering study of procedure is *Kobayakawa Kingo*, Soshō. For a simple summary of Tokugawa civil procedures, see *idem*, Saiban. The pioneering works on the substantive claims is *Kaneda*, Saiken-hô; and *idem*, Minji. *Kaneda* treats the formulary system as an amalgam of procedural and substantive law, which captures the reality of the proceedings. See also *Ishii Ryōsuke*, Meyasu. Particularly interesting recent volumes related to contract disputes are: *idem* VIII and VII; *Harafuji*, Keijihô.

[77] *Kobayakawa Kingo*, Soshō is still the most detailed work on the intricacies of jurisdiction in civil cases. In English, *Henderson*, Conciliation I ch. IV; the maps there are helpful. For jurisdiction in crimes, *Hiramatsu*, *supra* n. 65.

Third, even within the shogun's demesne (in a sense the largest fief, *i.e.* one seventh of Japan), the deputy's office in the countryside – but not the Edo Commissions or Conference Chamber – was the court of first and *last* resort; no appeal from a deputy's decision was provided in civil disputes among villagers. The same deputy system seems to have prevailed within most larger daimyo domains as well, but little is known concretely about proceedings in either shogunal or daimyo deputy offices.[78] All we know is that little evidence of appeals of civil cases has been found.

The villagers' co[illegible] t resort was the [illegible]

(1) in case of a deputy's [illegible] Edo were authorized and a Plaint Box[79] was installed in Edo to receive them; (2) illegal appeals (*osso*) were thrust upon higher officials in Edo frequently enough to evoke official proclamations inveighing against them. Heavy penalties were prescribed for illegal appeals, but often not imposed.[80]

In the later years of the Tokugawa period, villagers increasingly had dealings and disputes with parties from villages in a *different deputy*'s or a *different overlord*'s territory. These disputes, arising all over Japan, were settled by the shogunate in accordance with fixed rules, mostly in Edo, but also in the Osaka and Kyoto Commissions.[81]

The Edo Conference Chamber (*hyôjosho*),[82] comprised of the members (*bugyô*)[83] of the three commissions (Town Commission, Finance Commission, and Temple and Shrine Commission), was the highest organ in the administration of justice, and was authorized to handle straddling diversity cases where no single overlord had power over all the villagers and townsmen involved. In the handling these cases we find much refinement of pr dural rules and the nearest equivalent to a cation in contract enforcement.

Added to the diversity suits origir villages in the countryside large volume of Edo cla chants, that were handle mission. Similar commerc number went to other town comn bly the Osaka Commission, which ingly, had somewhat differe measures which were mor tors.[84] In many wa shogunate to stabilize credit a circulation of money in orde trade.[85]

17. *Hierarchy of documented claim categories.* What were the main requirements that to be met to obtain enforcement in mo suits? Emphasis must first be placed on the r quirement of a formal writing documenting the claims.[86] The Edo offices peremptorily sidestepped the difficulties of deciding on claims, with their characteristically conflicting testimony, even though there was no exclusion of oral defenses once a properly documented claim was presented. Confrontation of the parties was required so that each side's story would be heard, whenever preliminary settlement talks proved unsuccessful.[87]

When a claim was properly documented, the shogunate used an intricate formulary system to determine the methods of handling the claim and the remedies to be accorded. In a hierarchy of broad categories claims were ranked in descending importance according to the weight

[78] *Kumazaki, supra* n. 65, contains materials from a daimyo's deputy.

[79] See *Kujikata Osadamegaki* I art. 8–12.

[80] Three examples are: *Kukita* 149; *Nagayama* (*supra* n. 65) 584; and *Wigmore* (ed.) I 110.

[81] Osaka and Kyoto each had special jurisdiction in cases from four provinces contiguous with them; *Henderson*, Conciliation 92–97.

[82] *Ishii Ryôsuke* VIII 219–260 has a full description of the Conference Chamber.

[83] In Edo litigation the judge (*bugyô*) was an administrative officer, for whom trial of cases in the Conference Chamber was but a side duty. However, the Chamber was essentially devoted to administration of justice. This was a kind of separation of executive and judicial powers, but the same official exercised both. Actually the detailed handling of cases – evidence, testimony, records, searching for applicable precedents and decrees – was done by clerks (*tomeyaku, etc.*) under the *bugyô*. When we use the terms judge, court, and trial, these features of the Edo judiciary must be borne in mind. There was no independent court or judge in the modern sense.

[84] See *Ishii Ryôsuke* VII 123 and 299 for detai consideration of these differences in Osaka.

[85] See *Jimbo* for use of Osaka models in the 1843 reforms in Edo.

[86] *Harafuji*, Keijihô 592–699 gives a detailed analysis of the role of documents in the Edo proceedings.

[87] *Ishii Ryôsuke* VIII 3–219 has a recent summary of steps in a typical proceeding, esp. the confrontation (*taiketsu*) 134; in English, *Henderson*, Conciliation I 6.

shogunal policy placed on their official protec-

Land and water suits (*ronsho*);[88] (2) main
onkuji); (3) money suits (*kanekuji)*; (4)
ffairs (*nakamagoto*).[89]
categories reflects a contract/
tionally inflicted harm
re both recognizable by

(*ronsho*) were given preferential
employed the most effective
of their feudal significance re-
rice taxes. But land suits are
ost contract claims

distinctions between main and
suits The chief differences in remedies
ed to main suits as opposed to money
were as follows:

) The most important difference was that
gments in money suits ordered payment by
ited money (*kirigane*) installments over an
extended period after judgment; in main suits,
stricter lump-sum payment of a judgment was
dered on a day certain, and execution (*shindai-*
siri) followed on default.

(2) In a money suit the Commission's initial
dorsement (accepting a petition) instructed
e parties first to conciliate among themselves
ut of court, rather than going immediately to
l to validate the right to recover. Endorse-
nts for a main suit ordinarily did not order
out-of-court conciliation,[90] though the clerks in the Commission mediated constantly when the parties were before them. Since endorsement accepted a petition for processing, it was essential to determine at the time of acceptance whether a main suit or a money suit was involved as preliminary out-of-court conciliation had to be ordered for main suits.

(3) Compromise and withdrawal of a pending suit could be done upon the petitioner's request and under his seal in a money suit; both parties had to seal a main suit settlement.

(4) The occasionally issued private settlement decrees (*...rei*), which declared
were
handling the two categories were different.

Three characteristics of money suits made them less effective than main suits: the pressure to settle before trial, the dilatory payment schedule even after winning a judgment, and the occasional moratoriums during which the courts were ordered not to accept and enforce any money claims incurred prior to a certain date. The terms of moratoriums differed; moratoriums were decreed in 1661, 1682, 1685, 1702, 1719, 1746, 1789 and 1842.[91] A moratorium must have had a devastating effect on the creditors thus denied relief, as well as a serious impact on credit and commercial activity generally thereafter.

19. *Contents of main suits or money suits.* – For contract law, we need to know both the substantive rules used to separate the category of

[88] *Kobayakawa Kingo*, Soshō 529 notes that the typical villagers' (*murakata*) suit was the land dispute (*ronsho*), the townsmen's (*machikata*) the money suit (*kanekuji*). Edo proceedings, where *kanekuji* and diversity cases constituted the bulk of the case load, were not ordinarily available to the rural villager, because of the jurisdictional arrangements. But *ronsho* frequently were suits by one entire village against another from a different jurisdiction; as a diversity case the suit thus qualified for an Edo hearing.

[89] These suits were not accepted for hearing in Edo. *Kujikata Osadamegaki* II art. 33 ("Adjudication of money debt cases. – ... Where a number of persons are co-signatories of a deed [*i.e.* a contract] for the execution of some undertaking, and a suit regarding the division of the profits amongst the joint signatories is brought by any of them against the others, such a suit is not to be entertained, being a matter of company adjustment [*nakama no koto*]": transl. *Hall* (part IV) 184–186.) See *Kaneda*, Nakamagoto. For a precedent in English, see *Wigmore* (ed.) III 146–154, case no. 52 (Finance Commission).

[90] *Ishii Ryōsuke* says in his review (*supra* n. 29) that endorsements for both main and money suits required preliminary conciliation in diversity suits where one party was from Edo as with the "*nanuka uragaki*" as prescribed by *Kujikata Osadamegaki* II art. 1 ("Endorsement and preliminary sanctions of plaints. – ... The endorsement to be made on plaints in the above-named cases [diversity cases involving an Edo townsman as one party] is to be as follows: Let the village-headman (*na nushi*) and the house-heads (*iye-nushi*) and the punshayets (*gonin-gumi*) [literally five-man-groups] of both parties come together and settle the matter in dispute; in case they fail to reach an amicable settlement, let the parties as aforesaid appear before us within seven days": transl. *Hall* (part IV) 154).

[91] See *Ishii Ryōsuke*, Meyasu 81; also *Harafuji*, Keijihô 809. The 1719 decree was exceptionally harsh in that it outlawed until 1729 suits on *future* money claims as well.