

# Regulation of Unfair Contract Terms in Japan

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## I. Introduction

In the European Union, council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts pursues the objective of ensuring protection of consumers against unfair terms throughout Europe and at the same time aims at reinforcing the internal market<sup>1</sup>. Within the framework of the development of the Common Frame of Reference the emphasis is now on the improvement of the *consumer acquis*, more precisely on the review of 8 directives that relate to the sale of goods and services.

An examination of the history of Japanese law shows that Japan has tended to evaluate foreign legislations and introduce them to Japan or use them as basis for its proper legislation, after thorough and detailed research. This was also the case with the Japanese Consumer Contract Act (*Shohisha Keiyakuho*), which was largely influenced by plural foreign legislations, including the above-mentioned council directive on unfair terms in consumer contracts, and came out as an amalgam adjusted to the characteristics of Japanese society.

The aim of this article is to provide an outline of the main steps Japan has followed in the field of the regulation of unfair contract terms. Following this introduction in section I, section II presents the history of the regulation of standard form contract clauses (*Yakkan or Futsutorihikiyakkan*, a term of the same content as *Allgemeine Geschäftsbedingungen* in German law) in Japan. The reason why standard form contract clauses were chosen as object of this section is that they have been for a long time the core of the discussion related to the regulation of unfair contract terms in Japan, at least until the appearance of the above-men-

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<sup>1</sup> See Paolisa Nebia, *Unfair Contract Terms in European Law* (Hart Publishing, 2007) 3.

tioned Consumer Contract Act. Section III presents the Japanese doctrines related to the regulation of standard form contract clauses divided into 4 parts, namely (1) doctrines related to the ground of the binding force of standard form contract clauses, an issue which is directly linked to the evaluation of whether a clause has been incorporated into a contract or not, (2) doctrines related to the interpretation of standard form contract clauses and (3) doctrines related to the regulation of the content of standard form contract clauses. Section IV analyses the content of the Consumer Contract Act, which includes 3 articles (articles 8–10) focused on the regulation of unfair terms in consumer contracts. The content and the main issues related to each of these articles as well as precedents applying them to consumer disputes are treated in this section. Finally, section V briefly summarizes some general conclusions related to the regulation of unfair terms in Japan.

## II. History of the regulation of standard form contract clauses in Japan<sup>2</sup>

### A. The two leading cases

Although in Europe, R. Saleilles pointed out the specialty of adhesion contracts from early<sup>3</sup>, this issue did not attract almost at all the interest of Japanese scholars at that time. The incident which rose the attention of Japanese scholars was the lawsuit that followed a fire in the forests of Hokkaido Prefecture in northern Japan, in 1911. This lawsuit would later become known as the leading case of the “assumption of intention” doctrine, related to the binding force of standardized form contracts.

The case above has as follows; Plaintiff, who was living in Wakkanai City in Hokkaido and lost his house due to a forest fire, filed a lawsuit claiming for insurance money based on the fire insurance contract which Plaintiff had entered into with an insurance company in England. The main point at issue at the court procedure was the validity of a clause in

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<sup>2</sup> Concerning this topic, absolutely enlightening is Shoji Kawakami, *Yakkankisei no Hori*, (Yuhikaku, 1988).

<sup>3</sup> See, R. Saleilles, *De la déclaration de volonté: Contribution à l'étude de l'acte juridique dans le code civil allemand*, Paris, LGDJ, 1901.

the said contract stipulating that the insurance company was not liable for damages arising from forest fires. Plaintiff lost the suit at the court of first instance and won it at the court of appeals. In particular, the court of appeals judged that the said restriction of the company's liability deviates from the provisions of the Japanese Commercial Code, and should be therefore especially agreed on and included in the contract by the parties. In this case, since the clause had not been delivered or notified to Plaintiff, the Court did not admit the company's exemption from responsibility<sup>4</sup>.

The case was brought to the Supreme Court of Japan, which dismissed Plaintiff's claim and admitted the validity of the clause in dispute. The opinion of the Supreme Court was that since the parties did not express any intention of excluding the application of the exemption clauses in the contract, it should be *assumed* that they concluded the contract *under the intention* to apply them, unless counter evidence is provided<sup>5</sup>.

These contrary court decisions divided Japanese doctrine into two, namely an opinion supporting the judgment of the Court of Appeals and an opinion approving of the Supreme Court's decision.

Then, in 1923, the Great Kanto Earthquake struck the Kanto Plain on the Japanese main island of Honshu, with casualty estimates ranging from about 100,000 to 142,000 deaths (including those who went missing and were presumed dead). Conflagrations that broke out due to the earthquake led to a large number of fire insurance money cases, in which insurance companies refused to pay insurance money based on "earthquake exclusion" clauses included in insurance contracts. According to these clauses, insurance companies could shirk their obligation to pay insurance money, if damages were caused by fires breaking out directly or indirectly due to earthquakes.

The Japanese Federation of Bar Associations (*Nihon Bengoshi Kyokai*) as well as scholars advocated that such exclusion clauses were null. Their arguments were that (1) the said clauses were contrary to the mandatory provision of the former article 419 of the Japanese Commercial Code, which provided that insurers bear the obligation to compensate for damages caused by fires, regardless of the origin of the fire, (2) there was

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<sup>4</sup> Tokyo High Court Decision of March 17, 1916, *Shimbun* 1011-go, 21.

<sup>5</sup> Supreme Court Decision of December 24, 1916, *Minroku* 21-shu, 2182.

no concurrence of intention of the parties concerning the adoption of the said clauses, and (3) the clauses were of an illustrative character, and therefore not binding. On the other hand, there were scholars who supported the validity of such clauses. Finally, the issue of the earthquake clauses was politically resolved with the Japanese Government lending funds to insurance companies, and the insurance companies paying to persons insured a part of the insurance money as disaster solatium. However, the legal side of the issue remained unresolved<sup>6</sup>.

### B. The Influence of Raiser on Japanese Doctrines

In 1935, German jurist Raiser published “Das Recht der allgemeinen Geschäftsbedingungen”, a work which had a tremendous impact on Japanese doctrines. Research in this period, led almost entirely by scholars of Commercial Law, still continued being focused mainly on insurance standard form contract clauses and was directed towards the understanding of the legal nature of the phenomenon of standard form contract clauses.

From 1960, the interest of the research of standard form contracts shifts to the regulation of their misuse, same as in Germany at that time. The reasons of this shift in Japan seem to be (1) the high growth of the Japanese economy in the 1960's, which helped the use of standard form contracts clauses spread and (2) the impact of the trends in foreign countries and of issues such as environmental pollution and consumer protection that started becoming tangible.

Especially noteworthy in this period is research concerning standard form contracts in bank transactions. Following a lost case<sup>7</sup>, the Japanese Bankers Association (*Zenkoku Ginko Kyokai*) started preparing a standard form contract formula, and made public its tentative plan in 1960 and the final “Form of Bank Transaction Contracts” in 1962. Scholars expressed their opinions about this form, both before and after its publication, and

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<sup>6</sup> For a detailed presentation of the content of the decisions and the opinion of scholars on them, see Shoji Kawakami, *Yakkan Kisei no Hori*, above n. 2, at 46–54.

<sup>7</sup> Kyoto District Court Decision of December 11, 1958, Kakyusaibansho Minjihanreishu, 8-kan, 12-go, 2302 and Osaka High Court Decision of February 28, 1962, Kotosaibansho Minjihanreishu, 15-kan, 5-go, 309.

considerations were given. Since the said form involved multiple civil law issues, there was a noticeable participation of civil law scholars in the discussion regarding it. Thus, civil law scholars who had shown a neutral or even negative behavior towards the study of standardized contract forms got actively involved in it from this period and on.

Later, around 1965, research of standard form contracts seems to focus on standard form contracts used in air transportation agreements. The background of this trend was (1) the ratification (in 1967) of the Hague Protocol which amended the provisions of the Warsaw Convention to limit airline operators' liability in carriage of goods and passengers, and (2) successive plane crash accidents in 1963<sup>8</sup> and 1966<sup>9</sup>, that raised the issue of the validity of limits stipulated concerning compensations payable to the families of the deceased.

### C. The Shift of Interest to Consumer Protection

The slogan that had the largest impact on research concerning standardized form contracts from 1970 and after was "consumer protection". In Japan, the need for legislation on consumer protection emerged around 1960, but started being regarded as an issue which definitely required legislative intervention in 1970's. At first, the interest was focused on the safety and quality of products as well as the regulation of misleading indications and advertisements concerning products, but gradually came to include the regulation of transaction conditions and standard form contracts in its scope, and research in this direction became activated. Thus, scholars started treating consciously the issue of standard form contracts as part of the general issue of consumer protection.

From this period, research on foreign legislation, from the aspect of

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<sup>8</sup> A Nitto Aviation aircraft crashed en route from Osaka, Japan to Tokushima. All 9 passengers were lost.

<sup>9</sup> A Boeing 727-81 aircraft (All Nippon Airways (ANA) Flight 60) crashed on February 4, 1966. All 133 passengers and crew were lost when the aircraft crashed into Tokyo Bay about 10.4 km from Tokyo's Haneda International Airport in clear weather conditions while on a night approach. In the same year, A NAMC YS-11 (All Nippon Airways Flight 533) crashed en route from Osaka, Japan to Matsuyama on the island of Shikoku. This was the fifth crash in 1966 Japan.

the regulation of standardized form contracts, becomes more frequent, stimulated by legislative action in foreign countries, which was based on concrete consumer protection policies. At first, deep interest was shown for West Germany's "AGB-Gesetz" (1976), USA's UCC (especially article 2-302) and England's "Supply of Goods[Implied Terms] Act" (1973) and "Unfair Contract Terms Act" (1977), but later, research covered other countries too, such as France and Australia. Since Japan had at that time no comprehensive legislation for the regulation of standard form contracts, attention was also paid to judicial regulation of such contracts. Under these circumstances, the 41<sup>st</sup> symposium of the Japan Association of Private Law (*Nihon Shiho Gakkai*) was titled "Consumer Protection and Private Law", a topic which was approached not only from the scope of Civil and Commercial Law, but of Civil Procedure Law and Economic Law as well. During this symposium, standard form contracts were treated as the main issue, with 3 individual presentations by professors Makoto Ishihara, Kichie Yoshihara and Hisakazu Hirose<sup>10</sup> referring to them.

From this period, apart from individual theses, groups of scholars start conducting research on standardized form contracts, in response to the needs for consumer protection against unfair standard form contract clauses. These research groups indicated the existence of not few issues related to unfair terms in standard form consumer contracts, and proved that the grounds for a considerable number of disputes lie in phases before the conclusion of such contracts, in the practical use of standard form contract clauses and in the structure of the transactions itself.

The symposium of the Japan Association of Private Law in 1981 was held under the theme "Standard Contract Forms—Law and Reality". During this symposium, taking into consideration the fact that research in this field was no more focused on issues concerning the grounds of the binding force of such contracts, but on the propriety and validity of the clauses included in them, especially from the viewpoint of consumer protection, 3 general reports and 3 particular reports about standard form contract clauses in insurance/transportation and warehouse contracts,

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<sup>10</sup> The texts of these presentations can be found in the magazine "Shiho" which is published annually by the Japan Association of Private Law, in volume 40, pages 178 ff., 214 ff. and 180 ff. respectively.

consumer credit contracts and travel contracts took place.

At the same time, there was progress in research concerning consciousness of contracts and law in Japan, which shed light on the characteristics of the Japanese mentality towards contracts, and research on consumer consciousness was conducted as well<sup>11</sup>.

In 1982, a research and analysis of the trends in European countries that had already established legislation concerning standardized form contracts was conducted. The results of this research, which was commissioned by the Economic Planning Agency of Japan, were announced in 1983, bringing out that regulation of standardized form contracts in Japan was lagging behind.

Putting the above in order, it can be said that from 1970's, discussion on standardized form contracts which used to center until then on their binding force, started concentrating on the regulation of unfair standard form contract clauses. At first, the means proposed were an incorporation of provisions concerning the preparation, delivery and disclosure of such clauses, as well as a regulation through public order and standards of decency and fair and equitable principles. In the 1980's, from the viewpoint of consumer protection and under administrative supervision, drawing up standard form contract clauses that reflect consumer's rights properly was regarded as being the prevailing issue. Therefore, research in this period was focused on how to ensure the fairness of standard form contract clauses, and the means used for this purpose was analyses of the then existing situation of disputes occurring from such contract clauses.

Later, doctrines that attempt to regulate individual clauses by concretizing general clauses of Civil Law such as public order and decency appeared. At the same time, other doctrines analyzed in detail the present state of regulation models abroad and the issues occurring from from such regulation. As a result of such full-scale researches, the style of the regulation of standardized form contracts shifted from prior regulation, which was done separately for each business category with administration taking the lead (dominant style during the first half of 1980's), to judicial regulation.

In 1990's, also under the influence of the EC directive, a large part of

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<sup>11</sup> See Shoji Kawakami, *Yakkan Kisei no Hori*, above n. 2, at 90.

the doctrines surveyed the then existing situation of the regulation of unfair contract terms in Japan, and considered the remaining issues and the future directions of this regulation through a comparison with the said directive. It is characteristic that these doctrines tended to favor the establishment of a legislation which would protect consumers and that under the influence of the EU directive, “consumer contract” was regarded as a criterion which would demarcate the regulation object of such a legislation.

Later, the relevant discussion developed with the aim of preparing concrete and comprehensive rules so as to redress the gap of information amount and negotiating power between businesses and consumers, and to eliminate unfair contract terms more directly. This aim was finally realized with the establishment of the Consumer Contract Act in 2000 and its enforcement in 2001.

### **III. Doctrines concerning the Regulation of Standard Form Contract Clauses in Japan**

#### **A. Doctrines related to the Ground of the Binding Force of Standard Form Contract Clauses**

There are various doctrines concerning the ground of the binding force of standard clauses<sup>12</sup>. In the analysis which follows, these doctrines are divided into 4 constructions, according to the main theoretical basis of each of them.

##### **1. Legislation Structure Construction**

Prof. Kotaro Tanaka quotes the legal proverb saying “where there is a society, there is a law” and admits that standard form contract clauses make part of the sources of law<sup>13</sup>. Apparently influenced by this, Prof. Kan’ichi Nishihara also admits the validity of standard form contract clauses based on their nature as part of the legislation, namely as an

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<sup>12</sup> The analysis which follows attempts to summarize the main characteristics of each of the doctrines, whose content is rather complicated. For a more expanded description of their content and an overall evaluation, see Shoji Kawakami, *Minpo Sosoku Kogi* (Nihon Hyoronsha, 2007), 284–289.

<sup>13</sup> See Kotaro Tanaka, *Kaisei Shoho Sosoku Gairon* (1932) 188 ff.



autonomous legislation of the partial society in which the transactions related to the said clauses take part<sup>14</sup>. This doctrine, called “autonomous legislation doctrine” (*Jichihokisetsu*) is based on the fact that obtaining client’s consent was not regarded as being important in transactions and emphasizes the aspect of standard form contract clauses being consistent with state legislation and in harmony with ideological principles in transaction society. Therefore, it is a doctrine which easily opens the way towards a general and abstract regulation of the content of standard form contract clauses. However, this doctrine brought on much criticism due to the fact that it treats equally the factual use of standard form contract clauses as form of legislation in the society and the binding force of state legislation. Moreover, there were doubts about the propriety of entrusting to individuals the right to establish any legislation, a right which primary belongs exclusively to the state.

## 2. Contract Construction

This construction attempts to derive the binding force of standard form contract clauses from the mutual agreement of the parties. There are differences in the nuance of each of the doctrines supporting this construction. However, most of them consider that client’s intention does not correspond to the content of each of the standard clauses, but is a *comprehensive consent* to enforce such standard clauses.

According to Prof. Teruhisa Ishii’s “white background commercial practice doctrine” (*Shirajishokanshushetsu*), one can affirm the binding force of standard clauses if there is a commercial practice according to which transactions within a certain transaction area generally rely on such standard clauses<sup>15</sup>. This doctrine has been criticized as being unable to justify the binding force of standard clauses in cases where there is no such commercial practice or in cases of newly appearing transactions.

A recent influential doctrine emphasizes the importance of ensuring that the client has had the opportunity to know the content of the standard clauses, and at the same time raises the issue of the rational intention and rational expectations of the clients of the field which standard clauses con-

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<sup>14</sup> See Kan’ichi Nishihara, *Shokoiho* (1960), 52.

<sup>15</sup> See Teruhisa Ishii, *Shoho Sosoku* (Shoho I) (1967) 51.

cern<sup>16</sup>.

The method of attempting to achieve an effective regulation of standard form contract clauses by maneuvering the extent of the consent given towards them can be also seen in two new doctrines that at first sight seem to be contrasting. The first, admonished by Prof. Tomonobu Yamashita, respects the rational expectations that clients subjectively form during the transaction procedure, and expounds that the binding force of the standard clauses originates from a consent formed through juristic acts<sup>17</sup>. The second, admonished by Prof. Kichie Yoshikawa, regards the concurrence of the “rational and objective intent” of the whole body of clients and contractors directed to guaranteeing the equivalency of values and of the insurer’s intent as expressed in the phrasing of the standard form contract clauses (“objective consent”), as necessary element of the origination of binding force in the insurance standard form contract clauses<sup>18</sup>.

### 3. Pluralistic Construction

While the two constructions mentioned above seek for a ground of standard form contract clauses’ validity unitary, either in their legislative nature or in the contractual consent, the doctrine of Prof. Hisashi Tanikawa tries to explain the ground of the validity of standard form contract clauses pluralistically, in an authorization by law, in commercial practice or in contracts, depending on the type of business<sup>19</sup>, and precedents that seem to be following this opinion have appeared (i. e. Tokyo District Court’s decision of October 25, 1976). The idea of trying to explore the grounds for the binding force of standard form contract clauses according to the type of establishment or regulation is appraisable, but it seems that this construction has difficulties in overcoming the weaknesses of both

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<sup>16</sup> For a detailed presentation of this doctrine, see Shoji Kawakami, *Minpo Sosoku Kogi*, above n. 12, at 285.

<sup>17</sup> See Tomonobu Yamashita, *Futsuhokenyakkanron*, Hogaku Kyoshitsu (1979) 96-kan 9-go.

<sup>18</sup> See Kichie Yoshikawa, *Futsutorihikiyakkan no Kihonriron*, Hokengakuzasshi (1978) 481-go.

<sup>19</sup> See Hisashi Tanikawa, *Kigyotorihiki to Ho*, Iwanami Koza—Gendaiho (9) (1966).

contractual and regulative construction.

#### 4. Institutional Construction

The institutional construction, admonished by Prof. Ryuzo Maitani, expounds that standard form contract clauses compose a legislation which maintains the order of an “institution” based on the ideology of maintaining and developing enterprises and has a certain regulative nature, but stands in the middle of state legislation and contracts, and has therefore effects solely as a relative, abstract and objective law. According to this construction, since standard form contract clauses construct a relative and objective legislation, they are subject to regulation by state law which is higher in hierarchy, and since this legislation is abstract and objective, it needs “standard form contracts” so as to become concrete<sup>20</sup>. This construction aimed to sublate both autonomous legislation doctrine and contract doctrine, but unless the outlook of the “institution” on which this construction is based is accepted, it shares the weaknesses of both the doctrines mentioned above. In fact, it seems that this construction has not earned support from later doctrines.

#### 5. Current Situation and Precedents related to this Issue

In present Japan, the leading doctrine concerning this issue is the *contract doctrine* (contract construction), which advocates that adhesion contracts bind contract parties only if they have mutually agreed to make clauses included in such contracts a part of their agreement. The leading case on what requirements need to be satisfied so as to admit that adhesion contract clauses have become part of the agreement was the one concerning fire insurance adhesion contracts mentioned above. As already mentioned, in this case, the Japanese Supreme Court admitted that if by concluding the insurance agreement, the insured had sealed a statement accepting that adhesion contract clauses of the insurance company shall be applied, it should be assumed that the insured has concluded the agreement with the intention of making them part of the agreement. According to this “assumption of intention” doctrine, the same applies to cases that the insured was not aware of the content of such clauses at the

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<sup>20</sup> See Ryuzo Maitani, *Yakkanho no Riron* (1954).

time of the conclusion.

In this way, Japanese courts tend to easily apply the “assumption of intention” theory and admit the binding force of standard clauses. However, theoretically, the said leading case admits the possibility of counterevidence, a limitation to which the precedents that followed seem not to have paid sufficient attention. Moreover, scholars advocate that if we admit that the other party’s confidence in the propriety of the standard clause is the basis for the said assumption, this assumption does not cover cases in which the standard clauses betray such confidence and surprise the other party.

On the other hand, precedents do not apply the said theory to all kinds of adhesion contracts and clauses. In cases that the other party was neither aware of the content of such clauses at the time of the conclusion of the contract nor notified of them in a proper manner, and their content is contrary to the rational expectations of the other party, Japanese courts sometimes judge that these clauses do not form a part of the agreement, since there is no concurrence of intentions for their adoption.

For example, the Supreme Court Decision of December 16, 2005<sup>21</sup>, denied lessor’s allegation that a special agreement concerning the repair of normal wear in a rental agreement had been concluded. The ground for this decision was that since according to Japanese civil law the lessee does not bear the obligation to return the hired article (in this case, a building) to its original state, a clause providing such an obligation imposes an unexpected burden on the lessee. Therefore, in cases of such a clause, the extent of such normal wear must be clearly specified in the clause. If the extent is not specified in the agreement document, it is necessary that there has been clear mutual consent to the incorporation of the clause. In order to admit the existence of such consent, it is required that the lessor has given oral explanation to the lessee, and that the lessee has clearly understood this explanation and has gave its consent to the incorporation of the clause in the agreement.

In another case dated April 14, 2005<sup>22</sup>, the Akita District Court admit-

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<sup>21</sup> The full text of the decision can be found in the magazine *Hanrei Jiho*, 1921-go, 61.

<sup>22</sup> See *Hanrei Jiho*, 1936-go, 167.

ted a golf course operator's liability for damages related to the theft of a cash card from a valuables locker within the clubhouse of the said golf course and the withdrawal of a deposit using this card. According to the Court, the exemption clauses displayed on the lockers could not be admitted to have become part of the agreement between the user of the golf course and the operator, and were nothing more than a sole notice (article 594 par. 3 of the Japanese Commercial Code). Under these thoughts, the Court examined the circumstances, admitted that the said theft was a result of the operator's "carelessness" (article 594 par. 2 of the Japanese Commercial Code) and thus applied the brakes to the easy application of adhesion contract clauses.

## **B. Doctrines related to the Interpretation of Standard Form Contract Clauses<sup>23</sup>**

Based on the fact that standard form contract clauses are one-sidedly prepared by businesses, that they are legal techniques for the standard disposal of numerous contracts having as object a certain circle of clients and that clients have little opportunities to appreciate sufficiently their content, it has been expounded that the rules applied for the interpretation of standard form contract clauses should differ from those applied when interpreting common agreements.

First, due to the request for uniform disposal of numerous contracts and for average treatment of clients, an "objective interpretation" based on the *average rational understanding of the circle of clients* is required. Second, the need for "standard and uniform interpretation" of all the contracts that use the same clause is sometimes mentioned, but this is a result of the "objective interpretation", and does not necessarily need to be mentioned as a proper interpretation rule. Finally, it could be said that "teleologische Auslegung" and "doctrinal interpretation" that construe standard form contract clauses in the light of the purpose of the contracts aim at an interpretation which follows the contractual purpose of the particular parties, similarly to the case of normal contracts.

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<sup>23</sup> For a detailed analysis of the doctrines presented in this section and for further bibliography see Shoji Kawakami, *Minpo Sosoku Kogi*, above n. 12, at 291.

However, in cases where even though such interpretation rules have been applied, there are still multiple possible interpretations among which to choose, the risk which arises from this indefiniteness is born by the business who settled on and posted the standard form contract clauses (*ambiguitas contra stipulatorem est*). Moreover, since standard form contract clauses, are preset by businesses one-sidedly, the rule that no analogical interpretation or *interpretatio extensiva* which is disadvantageous to clients should be done is drawn out. This rule has the same function with the *ambiguitas contra stipulatorem* rule mentioned above. The fact that the said rules have been willingly used by judges in foreign countries as means of “hidden regulation of the content” of standard form contract clauses so as to limit their effect seems to have been fostering the wariness of businesses who have objected to any stipulation of them. However, the fact that even when the rational understanding of an average client is taken as criterion there are still cases where the meaning of the phrasing has a certain width, indicates that the stipulation of the said rules is desirable.

The Consumer Contract Act did not include provisions for this rule, on the ground that such a rule might induce claims by consumers and that in cases of ambiguous clauses a rational interpretation based on the principle of good faith should be sufficient.

### C. Doctrines related to the Regulation of the Content of Standard Form Contract Clauses

The main issue concerning this aspect is whether it is necessary to differentiate between standard clauses and other clauses in agreements, and to apply stricter regulation on the former. According to the doctrine which admits such necessity, in agreements which incorporate standard clauses, the client solely accepts to incorporate them comprehensively, and their content is decided one-sidedly by the enterprise (this is legally allowed for the sake of a streamline of exchanges). Therefore, unlike normal agreement clauses, it is necessary to check the content of such clauses stricter so as to keep the balance<sup>24</sup>.

On the other hand, there is a doctrine which advocates that when reg-

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<sup>24</sup> See Shoji Kawakami, *Yakkan Kisei no Hori*, above n. 2, at 392.

ulating the content of contract clauses, one should not focus on whether the clause is standard or not, but consider the existence of inequality, in a wide sense, of negotiating power between the parties of the agreement. The content of such an inequality, as used by the scholars advocating this doctrine, includes not only inequality related to economic power, but also gaps in exchange experience or legal knowledge, as well as superiority or inferiority of negotiating power caused by situations related to the conclusion of the agreement, i.e. the use of standard clauses by the other party. According to this doctrine, the use of standard clauses is one factor which indicates the inequality of negotiating power<sup>25</sup>.

Concerning this issue, precedents seem to be extremely reserved in setting up a general framework when regulating unfair contract terms. They rather deal with concrete disputes by applying general clauses such as public order and standards of decency or fair and equitable principles, or by interpreting the contract clause in the most appropriate manner. An example of the latter is the decision of the Japanese Supreme Court dated February 28, 2003<sup>26</sup>. In this case, the standard clauses of a hotel included a provision limiting the liability of the hotel for items, cash and valuables that the guest had not entrusted to the front desk, to the amount of 150,000 yen. However, the Supreme Court interpreted that this provision is not applied in cases of intent or gross negligence of the hotel.

Therefore, Japanese Courts did not establish any general argument framework for regulating standard clauses, and in most cases, the evaluation given to the fact that the clause at issue is a standard one is not evident from the wording of the decisions. Decisions such as that of the Sapporo High Court dated April 20, 1970<sup>27</sup>, which interpreted a jurisdiction clause of an insurance agreement rationally and against the insurance company, based on the institutional and legislative nature of standard clauses that bind the parties regardless of their knowledge or ignorance of the clauses, and that of the Morioka High Court dated February 13, 1970<sup>28</sup>, which declared null and void the standard clause at issue on the ground

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<sup>25</sup> See Yutaka Yamamoto, *Futojyokokisei to Jikosekinin—Keiyakuseigi* (1997) 75.

<sup>26</sup> Hanrei Jiho, 1829-go, 151.

<sup>27</sup> Kakyusaibansho Minjihanreishu, 21-kan, 3 & 4-go, 603.

<sup>28</sup> Kakyusaibansho Minjihanreishu, 21-kan, 1 & 2-go, 314.

that since usually standard clauses are fixed by enterprises one-sidedly, they easily attach extreme importance to the interests of the enterprise ignoring the interests of the other party, are an exception<sup>29</sup>.

Noticeable in this context are the provisions concerning the regulation of unfair terms, namely terms unfairly impairing consumers' interests, in the Japanese Consumer Contract Act.

### III. Consumer Contract Act of Japan

#### A. General Structure of the Act

The Japanese Consumer Contract Act (Act. No. 61 of 2000) consists of 53 articles, divided into 5 chapters. The articles concerning the regulation of consumer contract clause (articles 8–10) can be found under section 3 (“Nullity of Consumer Contract Clauses”) of chapter 2 (“Consumer Contracts”). The analysis which follows consists of an outline of articles 8 and 9 and of a detailed presentation of the issues related to article 10. Unlike chapter 1 of the Act which includes civil rules concerning the conclusion procedure of consumer contracts, chapter 2 consists of civil rules concerning the nullity of unfair contract clauses (unfair terms) that become an issue after the conclusion of consumer contracts.

Articles 8 and 9 provide a so-called black list of specific clauses that become null in total or in part, and article 10 provides general criteria for void consumer contract clauses. Article 10 is a comprehensive general provision, in the meaning that even contract clauses that do not fall under article 8 or 9 become void when falling under article 10. The provisions of this chapter are a significant progress toward an amelioration of the previous condition with extremely few specific provisions concerning the nullity of contract clauses in civil law and commercial law in force.

Concerning the normalization of unfair terms in consumer contracts, an opinion that such legislative normalization should be restricted to standard form contract clauses and an opinion that the object should be wider, including all kinds of consumer contract clauses were opposed, and the latter was adopted since the early stages of the legislative procedure. The

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<sup>29</sup> For a detailed analysis and evaluation of these precedents, see Yutaka Yamamoto, *Yakkan*, in *Minpo no Soten* (Yuhikaku 2007), 220–221.



reason for this is that the necessity for redress to consumers who are being treated unfairly is not restricted to cases where standard form contract clauses are used<sup>30</sup>.

## **B. Nullity of Clauses that exempt Businesses from Liability for Damages(article 8)**

The provision of article 8 of Japanese Consumer Contract Act has as follows<sup>31</sup>:

“(1) The following clauses of consumer contracts are void.

(i) Clauses that totally exclude a business from liability to compensate damages to a consumer arising from business’ default.

(ii) Clauses that partially exclude a business from liability to compensate damages to a consumer arising from the business’ default (such default shall be limited to cases where same arises due to the intentional act or gross negligence on the part of the business, business’ representative or employee).

(iii) Clauses that totally exclude a business from liability to compensate damages to a consumer arising by a tort pursuant to the provisions of the Civil Code committed on occasion of the business’ performance of a consumer contract.

(iv) Clauses that partially exclude a business from liability to compensate damages to a consumer arising by a tort (such torts shall be limited to cases where the same arises by intentional act or gross negligence on the part of the business, business’ representative or employee) pursuant to the provisions of the Civil Code committed on occasion of the business’ performance of a consumer contract.

(v) When a consumer contract is a contract for value, and there exists a latent defect in the material subject of the said consumer contract (when a consumer contract is a contract for work, and there exists a defect in the material subject of the consumer contract for work. The same shall apply

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<sup>30</sup> Seiichi Ochiai, *Shohisha Keiyakuho* (Yuhikaku, 2004) 144-146.

<sup>31</sup> An English translation of the Act is available at <http://consumer.go.jp/english/cca/index.html>

The translation of the provisions of the Act in this article is based on the translation mentioned above, with minor alterations.

in the following paragraph), clauses which totally exclude a business from liability to compensate damages to a consumer caused by such defect.

(2) The provision of the preceding paragraph shall not apply to clauses provided in item (v) of the preceding paragraph that fall under the cases enumerated in the following items.

(i) In the cases where a consumer contract provides that the business operator is responsible to deliver substitute goods without defects or repair the subject when there exists a latent defect in the material subject of the consumer contract.

(ii) In the case where a contract between the consumer and another business entrusted by the business or a contract between the business and another business for the benefit of the consumer, which was concluded before or simultaneously with the consumer contract, provides that the other business is responsible to compensate the whole or a part of the damage caused by the defect, deliver substitute goods without defects or repair the subject defect when there exists a latent defect in the material subject of the consumer contract.”

In the article above, paragraph 1 provides that consumer contract clauses that fall under it are void *ipso facto*, and paragraph 2 aims at guaranteeing consumers’ interests, by providing that even if a contract clause falls under item (v) of paragraph 1, paragraph 1 is not applied when the said clause falls under paragraph 2. Namely, contract clauses that fall under paragraph 1 of article 8 are void *ipso facto*, without the rationality of such clauses being an issue (black list). However, the special provision of paragraph 2 provides that clauses falling under item (v) of paragraph 1 that fall under paragraph 2 as well are not void based on paragraph 1.

The list of clauses in paragraph 1 is exclusive (not indicative), but interpretation of whether a contract clause falls under this list should not be formal and rigid, but flexible so as to guarantee consumers interests.

The provision of article 8 is partially mandatory, in the meaning that it cannot be subject to modifications by contract parties that are disadvantageous to consumer. Moreover, burden of proof for the fact that a contract clause falls under paragraph 1 of article 8 is born by consumers, and burden of proof for the fact that a contract clause falling under item (v) of paragraph 1 falls under paragraph 2 as well is born by businesses.

Contract clauses that are based on provisions of regulations applied

in priority to international treaties entered into by Japan or to Japanese Consumer Contract Act are valid, even when they fall under paragraph 1<sup>32</sup>.

**C. Nullity of Clauses that stipulate the Amount of the Damages paid by Consumers and such other Clauses (article 9)**

The provision of article 9 of Japanese Consumer Contract Act has as follows:

“The following clauses of a consumer contract are void to the extent provided in each respective item.

(i) As to a clause which stipulates the amount of liquidated damages in case of a cancellation or fixes the penalty, when the total amount of liquidated damages and the penalty exceeds the normal amount of damages to be caused by the cancellation of a contract of the same kind to the business in accordance with the reason, the time of the cancellation and such other factors, the part that exceeds the normal amount.

(ii) As to the clauses in a consumer contract that stipulate the amount of damages or fix the penalty in the case of a total or partial default (if the number of payments is more than one, each failure of payment is a default under this item) of a consumer who is over due, when the total amount of liquidated damages and the penalty exceeds the amount calculated by deducting the amount of money actually paid from the amount of money which should have been paid on the due date and multiplying by 14.6% per year in accordance with the number of days from the due date to the day on which the money is actually paid, the part that so exceeds.”

The purport of this article is to guarantee consumer's profits by providing that clauses that stipulate the amount of the damages paid by consumers are partially void. Paragraph 1 stipulates that the part which exceeds the average amount of damages incurred by the business due to the termination of a consumer contract is void. Moreover, paragraph 2 provides that the part which exceeds the amount calculated by multiplying by 14.6% the amount of liquidated damages payable by a consumer who is over due is void as well.

Unlike article 8 which stipulates that certain clauses are void as a whole, this article provides that only a part of certain clauses is void.

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<sup>32</sup> Seiichi Ochiai, *Shohisha Keiyakuho*, above n. 30, 114–117.

However, article 9 stipulates a black list same as article 8, in the meaning that the clauses that fall under it are partially void, regardless of whether their content is rational or not. The list of article 9 is restrictive and not indicative. However, same as article 8, interpretation of whether a contract clause falls under this list should not be formal and rigid, but flexible so as to guarantee consumers interests.

The provision of article 9 is partially mandatory, in the meaning that it cannot be subject to modifications by contract parties, that are disadvantageous to consumer. Moreover, burden of proof for the fact that a contract clause falls under article 9 is born by consumers.

Contract clauses that are based on provisions of regulations applied in priority to international treaties entered into by Japan or to Japanese Consumer Contract Act are valid, even when they fall under article 9<sup>33</sup>.

#### **D. Nullity of Clauses that impair the Interests of Consumers one-sidedly(article 10)**

##### **1. Introduction**

The provision of article 10 of Japanese Consumer Contract Act has as follows:

“Clauses that restrict the rights of consumers or expand the duties of consumers beyond those under the provisions not related to the public order applicable pursuant to the Civil Code, the Commercial Code and such other laws and regulations and that, impair the interests of consumers unilaterally against the fundamental principle provided in the second paragraph of article 1 of the Civil Code, are void.”

Unlike the provisions of articles 8 and 9 that concern the nullity of particular contract clauses, article 10 is a comprehensive provision concerning unfair terms in consumer contracts in general. Therefore, even if a contract term does not fall under articles 8 or 9, it is void if it falls under article 10. This means that the range covered by article 10 includes all consumer contract terms, and this article is mandatory and plays an important role as a general provision for unfair terms.

Clauses that fall under article 10 and are void must firstly be “Clauses that restrict the rights of consumers or expand the duties of consumers

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<sup>33</sup> Seiichi Ochiai, *Shohisha Keiyakuho*, above n. 30, 135–136.

beyond those under the provisions not related to the public order applicable pursuant to the Civil Code, the Commercial Code and such other laws and regulations". This requisite uses the "provisions not related to the public order applicable pursuant to the Civil Code, the Commercial Code and such other laws and regulations" as criterion for deciding whether the clause at issue restricts or expands the duties of consumers, so as to clarify the general judgment rule related to unfair terms.

Secondly, such clauses need to be ones that "impair the interests of consumers unilaterally against the fundamental principle provided in the second paragraph of article 1 of the Civil Code". This second requisite becomes an issue solely for clauses that fulfill the first requisite. Therefore, clauses at issue are void solely when they fulfill both requisites. The burden of proof for the fact that a contract clause fulfills both requisites is born by consumers<sup>34</sup>.

## 2. Necessity for the provision of Article 10

The necessity for a general provision concerning unfair terms lies on the following reasons. Since civil rules that concern unfair terms are enacted so as to overcome issues related to the low foreseeability of general provisions such as article 90 of the Japanese Civil Code, their foreseeability needs to be extremely high. Thus, it is desirable to list up in a concrete manner all the unfair clauses that should be declared void. However, consumer contracts are variegated, and it is difficult in fact to predict what kinds of clauses might appear in the future. In other words, it is impossible to have a perfect unfair clauses list in this sense, as clauses that escape shall always exist. However, the aim of Consumer Contract Act, which is to guarantee consumer's interests, cannot be achieved by letting such clauses escape. Therefore, a general provision is necessary as a final remedy.

Concerning the issue of such a general provision, two basic problems were raised during the legislative procedure. The first was whether such a general provision would be a rule of low foreseeability due to its comprehensiveness, and would be thus contrary to the legislative purpose of Consumer Contract Act. Concerning this point, there is no doubt that one

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<sup>34</sup> See Seiichi Ochiai, *Shohisha Keiyakuho*, above n. 30, 144.

of Consumer Contract Act's aims is to ameliorate the low foreseeability of civil rules included in Civil and Commercial Law. However, the main legislative purpose of the said Act is to guarantee consumers' appropriate interests in contract related disputes, and initiating rules of high foreseeability could be said to be an instrument for this. Therefore, when balancing between the interest of covering exhaustively all unfair clauses and the need for high foreseeability, giving priority to the former is not contrary to the legislative purpose of Consumer Contract Act. The second problem related to such a general provision was whether it is sufficient to use general provisions of Japanese Civil Law in effect concerning the principle of good faith or public order and morals, and therefore not necessary to include a general provision in Consumer Contract Act. However, if it was possible to handle various unfair terms using the general provisions of Civil Law in effect, consumer contract disputes in Japan would not have aggravated to this extent.

Thus, in the light of this necessity for a general provision concerning unfair terms, the significance of article 10 is extremely large. There are only few provisions in Japanese Civil and Commercial Law that target on unfair terms directly, and article 10 has been an essential amelioration in this context<sup>35</sup>.

### 3. The Requisites of Article 10

#### Issues related to the First Requisite

The phrase "Civil Code, the Commercial Code and such other laws and regulations" of the first requisite of article 10 denotes all kinds of laws and regulations related to the content of consumer contracts.

The phrase "provisions not related to the public order" denotes so-called adoptive provisions, namely provisions that are not mandatory. Contract clauses that are contrary to mandatory provisions are void under article 91 of the Japanese Civil Code, according to which "If any party to a juristic act manifests any intention which is inconsistent with a provision in any laws and regulations not related to public policy, such intention shall prevail."<sup>36</sup>

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<sup>35</sup> For a detailed presentation of the necessity of this article, see Seiichi Ochiai, *Shohisha Keiyakuho*, above n. 30, 145.

Concerning the range of “provisions not related to the public order”, there is an opinion interpreting it narrowly by asserting that solely express adoptive provisions are indicated<sup>37</sup>, and an opinion interpreting it widely by asserting that non-express provisions are also included<sup>38</sup>.

The former opinion interprets the word “provisions” strictly. However, the aim of the first requisite is to compare, when judging the unfairness of the clause at issue, the situation that occurs by applying the said clause and the situation that would occur as a result of the adoptive clauses etc., assuming that the said clause does not exist, and to base the said judgment on whether the former situation is more disadvantageous than the latter. The reason for this is that there is high probability that contract clauses stipulating rights and obligations that are disadvantageous to the consumer compared to rights and obligations the consumer would have been granted if the clause at issue did not exist are unfair.

The rights and obligations that a consumer would have been granted if the clause at issue did not exist can be confirmed solely by taking into consideration not only express provisions, but also non-express adoptive provisions and general legal principles concerning contracts that have been generally admitted through the accumulation of precedents. Therefore, the majority of doctrine and precedents seems to be admitting that “provisions not related to the public order” are not restricted to express adoptive provisions, but include widely non-express adoptive provisions and general legal principles concerning contracts.

Another issue is whether article 10 is applied in cases of clauses stipulating the core of the contract (core clauses), such as the object or the price of the contract.

Concerning this issue, there is an opinion which asserts that core clauses are out of the scope of article 10<sup>39</sup>. The grounds for this opinion

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<sup>36</sup> The translation of the provisions of Japanese Civil Code in this article is based on the one available at <http://www.japaneselawtranslation.go.jp/law/detail/?re=02&ky=sharetsplit&page=10&la=01>

<sup>37</sup> See Tsuneo Matsumoto, *Kiseikanwajidai to Shohishakeiyakuho*, Hogaku Seminar, 549-go, 7.

<sup>38</sup> See Keizo Yamamoto, *Shohishakeiyakurippo to Futojyokokisei*, NBL, 686, 14.

<sup>39</sup> Masami Okino, *Shohisha Keiyakuho (Kasho) no Ichikento*, NBL, 657-go, 56–57.

are that (1) the items related to the main object or the price of the contract should be left to the care of the market, (2) there are no negative effects if consumers are provided with sufficient information during the contract conclusion process and (3) cases where there is an extreme unbalance related to the price of the contract can be redressed through article 90 of the Japanese Civil Code according to which “A juristic act with any purpose which is against public policy is void.”

However, concerning (1), the possibility of clearly distinguishing between the core and the incidental part itself is questionable.

Moreover, concerning (2), in the light of the current situation of consumer disputes, it is difficult to admit that under the present state businesses provide consumers information which is sufficient for a rational decision making by consumers. Further, as is evident also from the fact that the duty to provide information was not expressly stipulated in Consumer Contract Act, in Japan there is still no legislative basis for a duty to provide information during the contract conclusion procedure. Under such circumstances, it can be said that there is no basis for leaving this issue completely to the care of the market as well.

Additionally, concerning (3), article 90 of Civil Code (public policy) is basically an article on the basis of which actions that are contrary to state discipline or moral principles have been declared void in extremely exceptional cases. Therefore, at least according to the present general understanding, it is questionable whether consumers involved in disputes can be given proper redress through article 90 of Civil Law<sup>40</sup>.

Therefore, it should be admitted that core clauses are within the scope of article 10.

A last issue related to the first requisite of article 10 of Japanese Consumer Contract Act is whether this article is also applied to contract clauses that have been individually negotiated. Opinions concerning this issue are also divided.

The opinion which asserts that article 10 cannot be applied to clauses that have been individually negotiated is based on the following grounds:

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<sup>40</sup> For a detailed presentation and evaluation of both doctrines, see Nihonbengoshirengokai Shohishamondaitaisakuiinkai, *Kommentar Shohisha Keiyakuho* (Shojihomukenkyukai, 2001) 166–168.



(1) regulating unfair terms even in cases where there has been individual negotiation is irreconcilable with the basic principle of self-responsibility based on self-determination, (2) there are no negative effects if sufficient information is provided to consumers during the contract conclusion procedure and (3) redress through public policy (article 90 of Civil Code) is possible also in cases of contracts that have been individually negotiated.

However, concerning (1), there is the risk of businesses evading the regulation of unfair terms by holding typical (not substantial) negotiations with consumers, and concerning (2) and (3), the same arguments presented above in items (2) and (3) concerning core clauses apply here as well.

Therefore, it should be admitted that article 10 can be applied also to individually negotiated clauses<sup>41</sup>.

### **Issues related to the Second Requisite**

The second paragraph of article 1 of the Civil Code which provides that “The exercise of rights and performance of duties must be done in good faith” stipulates the principle of good faith.

An issue related to the principle of good faith as in article 10 of Japanese Consumer Contract Act is its relation with the general provisions of Civil Code (article 1 par. 2 and article 90).

There are two opinions concerning this issue<sup>42</sup>. The first asserts that only contract clauses that are void under the provision of article 1 par. 2 of Civil Code in effect can be declared void under article 10 of Consumer Contract Act (confirmative doctrine). The second asserts that contract clauses that are not void under the provisions of Civil Code in effect can also be declared void under article 10 of Consumer Contract Act (creative doctrine).

According to the former, contract clauses that are not contrary to paragraph 2 of article 1 of Civil Code cannot be declared void under article 10 of Consumer Contract Act. This seems to be also the point of view of the legislator, since the commentary published by the National Life

<sup>41</sup> See for example Masami Okino, *Shohisha Keiyakuho (Kasho) no Ichikento*, above n. 37, 57.

<sup>42</sup> For a detailed presentation and analysis of both doctrines, see Keizo Yamamoto, *Shohishakeiyakurippo to Futojyokokisei*, above n. 36, 19.

Bureau of the Cabinet Office states that clauses that “are not contrary to paragraph 2 of article 1 of Civil Code, cannot be declared void under this article”<sup>43</sup>.

However, Civil Code has been based on a classical civil law principle, according to which contract parties collect all necessary information on their own responsibility and make decisions of their own free will based on such information. Under this principle, solely extremely pernicious actions are exceptionally declared void based on general provisions.

In the light of the legislative purpose of Consumer Contract Act, articles 8 and 9 declare void contract clauses that are not necessarily contrary to articles 1 par. 2 and 90 of Civil Code in effect. Moreover, as the position of article 10 within the Act indicates, it is a general provision which comprehends both articles 8 and 9. Therefore, asserting that clauses that are not contrary to paragraph 2 of article 1 of Civil Code cannot be declared void based on article 10 of the Act would be an interpretation which extremely lacks coherence with articles 8 and 9.

Further, it can be said that with confirmative doctrine taken as a premise, there would be no need to include article 10 in the Act. The reason for this is that contract clauses that are contrary to the principle of good faith or to public order under Civil Code would have restricted or no effect in the first place, even without article 10.

Due to the reasons mentioned above, and to the additional grammatical reason that article 10 mentions about clauses that are “against the fundamental principle provided in the second paragraph of article 1 of the Civil Code” and not clauses that are “against the second paragraph of article 1 of the Civil Code”, most scholars assert that article 10 of Consumer Contract Act declares void also clauses that are not necessarily void under Civil Law in effect.

Another important issue related to the second requisite of article 10 is what the concrete criteria are, on which the judgment on whether a clause satisfies the second requisite should be based.

Since the second requisite of article 10 is abstract from its nature, scholars have pointed out that accumulation of court judgments would be

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<sup>43</sup> Naikakufukokuminseikatsukyoku Shohishakikakuka, *Chikujokaisetsu Shohishaho* (Shojihomu, 2007) 203.

necessary so as to concretise what kinds of contract clauses are void as being contrary to this article.

At the same time, due to the necessity for a certain degree of forecast, so as to accomplish the legislative purpose of protecting consumers and to avoid shrinking effects on proper economic activity, concretizing the criteria of the second requisite has been treated as a practically essential issue<sup>44</sup>.

The basic line of thinking concerning this issue seems to have been based on the legislative purpose of the Act as stipulated in article 1 according to which "The purpose of this Act is to protect the interests of consumers, and thereby contribute to the stabilization of and the improvement in the general welfare and life of the citizens and to the sound development of the national economy, in consideration of the disparity in quality and quantity of information and in negotiating power between consumers and businesses, by permitting a rescission of manifestation of intentions to offer or accept contracts made by consumers when they misunderstood or are distressed by certain acts of businesses, and nullifying any clauses, in part or in whole, that exempt the businesses from their liability for damages or that otherwise unfairly harm the interests of consumers, in addition to providing a right to qualified consumer organizations to demand an injunction against businesses etc., for the purpose of preventing the occurrence of or the spreading of damage to other consumers."

Taking into consideration this legislative purpose, clauses fulfilling the second requisite are those by which even if the opposite interests of businesses are taken into account, there is need to rectify the disparity in information and negotiating power between consumers and businesses.

More specifically, such clauses are those with an unbalance between the disadvantages incurred by consumer due to the clause and the disadvantages incurred by businesses if the said clause is declared void. The graver the disadvantage incurred by the consumer due to the contract

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<sup>44</sup> For examples of attempts made by attorneys and scholars for a theoretical concretization of the criteria of the second requisite, see Nihonbengoshirengokai Shohishamondaitaisakuiinkai, *Kommentar Shohisha Keiyakuho*, above n. 38, 172, as well as Seiichi Ochiai, *Shohisha Keiyakuho*, above n. 30, 150–152.

clause is, the graver the disadvantage incurred by the business if the said clause is declared void needs to be. In cases where disadvantages of both sides examined from this perspective are unbalanced, the clause at issue needs to be declared void as being an improper encroachment on consumer's interest by the business.

#### **4. Effects of Article 10**

When the contract clause at issue falls under article 10, it is declared void and its legal effects do not occur.

An issue concerning this nullity is whether the contract clause is declared void in whole or in part.

Concerning this issue, there is an opinion asserting that partial nullity should be the general rule<sup>45</sup>. However, in consumer contracts, the content of the clauses is prepared by businesses one-sidedly, and it is not unfair to have businesses that have prepared the clauses by themselves bearing the disadvantage. Moreover, if courts sustain to the very limit the validity of comprehensive clauses stipulated by businesses, unfair clauses will continue spreading, and there will be danger that consumers who dispute such terms incur disadvantages. Therefore, from the viewpoint of promoting the normalization of the content of consumer contracts, unfair clauses should be declared void in whole.

The nullity mentioned above concerns the individual clauses at issue and not the contract in whole. This is sufficient for eliminating consumer's disadvantages, and the gap which occurs due to their nullity should be supplemented by adoptive provisions etc.

However, in cases where sustaining the validity of the rest of the contract by supplementing the void part causes intolerable disadvantages to the parties, the nullity of the contract in whole is exceptionally admitted.

### **E. Report by the Consumer Contract Act Evaluation and Examination Committee**

#### **1. Introduction**

In August 2007, the Consumer Contract Act Evaluation and

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<sup>45</sup> See Yutaka Yamamoto, *Shohisha Keiyakuho*(3), Hogakukyoshitsu, 243-go, 63.

Examination Committee of the National Life Council officially announced the results of a survey which evaluated Consumer Contract Act and examined the points at issue related to the content of the Act<sup>46</sup>.

In this report, it is mentioned that a large number of judicial precedents concerning articles 9 par. 1 and 10, also including Supreme Court decisions, have been accumulated, with these articles thus demonstrating a large effect on the protection of consumers' interests. However, it is also noticed that the said precedents tend to concentrate on issues related to certain contract types, such as tuition reimbursement request and security deposit reimbursement lawsuits. In the light of the fact that a high degree of expert knowledge is needed for judging whether a contract clause is unfair and that the damages incurred by individuals are of relatively small sums, the possibility that the use of unfair clauses in certain contract types has not come to light yet cannot be denied. In the following sections, an outline of the precedents related to articles 8, 9 and 10 as included in the committee report is presented.

## **2. Outline of Precedents related to Article 8**

The sole precedent related to article 8 seems to be the Tokyo Summary Court decision of April 27, 2005, which rejected the assertion that a special agreement which stipulates that the amount of damages related to a construction contract shall be decided based on the damages criteria periodically decided by the business circle concerned is void on the basis of item 2 of paragraph 1.

## **3. Outline of Precedents related to Article 9**

### **The meaning of the “average amount of damages to be caused” (item 1 of article 9) and the Burden of its Proof**

According to the legislator, the phrase “average amount of damages” indicates the average amount of damages which can be calculated by the categorization of the plural contracts of the same type entered into by the same business. More specifically, this means the average amount of the damages incurred by the said business due to the termination of plural

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<sup>46</sup> The full text of this report can be downloaded from <http://www.consumer.go.jp/seisaku/shingikai/hokokusyo/hokokusyo.html>

contracts, that can be categorized as belonging to the same type in terms of termination ground, period and other characteristics. This also seems to be the understanding of court decisions.

Concerning the burden of proof of this average amount, lower-court decisions were divided, but the Supreme Court has recently judged in a tuition reimbursement case that a student who asserted that a non-reimbursement special agreement clause is void as falling under article 9 of Consumer Contract Act, bears the burden of proving the average amount of damages as well as the part exceeding them.

Thus, the Supreme Court judged that the burden of proof concerning the “average amount of damages” is basically born by the consumer (the Supreme Court left open the possibility of judgment based on practical estimation). However, information and material that can be obtained by consumers is hardly more than that related to general criteria in the business circle at issue, and it is therefore hard in most cases to prove the average amount of damages that are incurred by businesses of the said circle pursuant to the termination of contracts. Taking into consideration this situation, the report suggests that an ease of the difficulties consumers face when proving should be considered.

#### **Precedents related to Item 2 of Article 9**

The representative decision concerning item 2 of article 9 is Tokyo High Court decision of May 26, 2004, according to which the part of delay damages related to a credit guarantee assignment agreement which exceeds 14.6% is void.

#### **4. Outline of Precedents related to Article 10**

Concerning the issue of the range of “provisions not related to the public order”, low-court decisions seem to tend to interpret such adoptive provisions as wide as possible. There are court decisions that expressly take into consideration the essence of the contract at issue or the legal principles adopted by judicial precedents.

Concerning the second requisite of article 10, there are court decisions admitting that the said requisite has a different meaning from that of the principle of good faith as stipulated in Civil Code, but judgments related to this issue are still divided. The factors that court decisions take into

consideration when judging whether a clause fulfills the second requisite are mainly the necessity of the clause at issue and the rationality of its content, the explanations and information provided to consumers, the conditions of the negotiations (whether consumers can request businesses to amend the content of the clauses) etc.

#### **F. Application for Injunction against the Use of Unfair Terms**

The means of the consumer class action was introduced in Japan for the first time by the amendment of the Consumer Contract Act in 2006. This amendment vests the right to take measures, i.e. to suspend consumers' proposals that include clauses provided in articles 8 to 10 of Consumer Contract Act or businesses' assents to such proposals (right to demand an injunction against the use of unfair terms), in certain consumer groups certified by the Prime Minister (qualified consumer organizations, article 12 paras. 3 and 4).

The ground for this legal means is that no sufficient protection of consumers against unfair terms can be achieved solely by vesting the right of arguing the validity of agreements including unfair terms in the individual consumers who concluded them. Therefore, it is necessary to ensure that consumers also have the choice not to conclude such agreements from the beginning. The most proper means to ensure this is to vest the right to request the suspension of agreements including unfair terms in qualified consumer organizations, who are the ideal protectors of the interests of consumer groups.

It would not be exaggerated to say that standard clauses consist the main object of this right to request for suspension, because, first, the Act is not using the word "standard clauses", and second, the right to request for suspension can be exercised if a business has already concluded agreements including terms at issue with many and unspecific consumers or might conclude such agreements. Since it is generally accepted in Japanese doctrine that the term "standard clauses" includes terms that are used against a large number of persons (and not against "many und unspecific" persons), the range of the said provision is narrower than that of the term "standard clauses". On the other hand, in view of the fact that Consumer Contract Act does not provide for an *a priori* special treatment of contract terms that have been individually negotiated, terms individual-

ly negotiated may also be object of injunction orders. From this viewpoint, the object of injunctions is wider than the range of “standard clauses”<sup>47</sup>.

## V. Conclusion

In Japan, the regulation of unfair contract terms, which began and developed for a long period of time with standard contract form clauses being its main object, has the following characteristics:

(1) Due to the lack of a proper legislation allowing courts to directly intervene into the content of unfair clauses, Japanese courts have been reluctant to do so, and have been attempting to assure the protection of the weak party either by denying the incorporation of such clauses into the contract or through an interpretation of such clauses which would favor the weak party. This situation has changed with the appearance of the Consumer Contract Act, and the interest of research has shifted to the analysis of court decisions that apply articles of the Consumer Contract Act.

(2) Doctrine in Japan related to the regulation of unfair contract terms has developed based on a theoretical construction which divides the stages of such regulation into regulation by their incorporation, regulation by their interpretation and direct regulation of their content. However, the scenery seems to have changed with the emergence of the applications for injunctions against unfair terms, which has led to the creation of a new, fourth stage, the stage of injunctions. This new means opens many possibilities, provided however that qualified consumer organizations will function.

Currently, in Japan, Civil Code is under review, and there is discussion about whether provisions related to consumer contracts should be newly included into the amended Civil Code. From this viewpoint, regulation of unfair contract terms, which was based at the beginning on provisions of Civil Code and then shifted to provisions of Consumer Contract Act, seems to be currently swinging between these two legislative texts, waiting for the developments to come.

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<sup>47</sup> See Yutaka Yamamoto, *Yakkan*, above n. 29, 221.