unconstitutionality, some lower courts invalidated the HR election in December, 2012, immediately after this judgment. If based on this Opinion, it is clear that the election system of the member of HC which holds a disparity with a higher unequal nature than that of HR is unmaintainable in the present state, since the equality of value of voting rights essentially is not distinguished. Now, the argument towards a constitutional amendment is increusing in Japan. In order to collateralize the legitimacy of the legislature with the authority of an initiative of a constitutional amendment, the political wing must carry out fundamental revision of their election system.

2. Law of Property and Obligations

X v. Y
Supreme Court, March 16, 2012
Case No. (Ju) 332 of 2010
66 (5) MINSHU 2216; 1370 HANREI JIHO 135; 1370 HANREI TAIMUZU 115

Summary:

A clause in the general conditions applicable to a life insurance contract, which provides that the contract shall lapse without demand of performance in the event of nonpayment of insurance premiums, is not regarded as a clause that "impairs the interests of consumers unilaterally against the fundamental principle provided in the second paragraph of Article 1, paragraph (2) of the Civil Code," as defined in Article 10 of the Consumer Contract Act.

Reference:

Article 10 of the Consumer Contract Act; Articles 91 and 541 of the Civil Code.

Facts:

X entered into a medical care insurance contract with the appellant on August 1, 2004, and also entered into a life insurance contract with the

appellant on March 1, 2005, respectively (these insurance contracts shall hereinafter be collectively referred to as the "Insurance Contracts"). Under the Insurance Contracts, insurance premiums were supposed to be paid on a monthly basis. The general conditions applicable to the Insurance Contracts (hereinafter referred to as the "General Conditions") include the following clauses concerning the due date of payment of monthly installments of insurance premiums and the lapse of the insurance contract.

A. The second and subsequent installments of insurance premiums should be paid during the period between the first day and the last day of the month which the monthly anniversary date falls in.

B. (a) With regard to the payment of the second and subsequent installments of insurance premiums, a grace period shall be given, which is between the first day and the last day of the month following the due month of payment. (b) In the event of nonpayment of insurance premiums within the grace period, the insurance contract shall lapse as of the day following the date of expiration of the grace period (this clause shall hereinafter be referred to as the "Lapse Clause").

C. Even where the grace period has expired with insurance premiums remaining unpaid, if the sum of the insurance premiums and interest thereon payable does not exceed the amount of surrender value, Y shall automatically loan an amount equivalent to the insurance premiums to the policyholder so as to have the insurance contract survive validly (this clause shall hereinafter be referred to as the "Automatic Premium Loan Clause").

D. In the event of the lapse of the insurance contract, the policyholder may reinstate the insurance contract with the consent of the Y, within one year (in the case of the Medical Care Insurance Contract) or within three years (in the case of the Life Insurance) from the day on which the insurance contract lapsed (this clause shall hereinafter be referred to as the "Reinstatement Clause").

It was stipulated that insurance premiums under the Insurance Contracts should be paid by a bank transfer. The insurance premiums under the Insurance Contracts for January 2007, for which the due month of payment was that month, were not paid within January 2007 due to insufficient funds in the transfer account designated for the payment of the

insurance premiums, and were not paid within February 2007, either. Then Y treated the Insurance Contracts as lapsed.

In March 2007, X requested Y to reinstate the Insurance Contracts offering the money equivalent to the insurance premiums under the Insurance Contracts for January, February, and March 2007. Nevertheless Y did not give the consent which had been needed for the reinstatement of the Insurance Contracts. Then X claims against Y declaration of the existence of the Insurance Contracts, arguing that the Lapse Clause is void under Article 10 of the Consumer Contract Act.

Yokohama District Court denied X's claim. Tokyo High Court, however, found the Lapse Clause to be void under Article 10 of the Consumer Contract Act and upheld X's claim, holding as follows: (1)The due date of payment for the second and subsequent installments of insurance premiums under the Insurance Contracts is the last day of the grace period stipulated in the General Conditions, and the Lapse Clause provides that the Insurance Contracts shall lapse immediately upon the expiration of the due date of payment. (2)The Automatic Premium Loan Clause and the Reinstatement Clause are insufficient as means to cover the disadvantage suffered by the policyholder from the lapse of the contract. Whether or not Y had adopted the operational procedure of sending a reminder for payment of insurance premiums upon the policyholder before the lapse of the contract in the event of default in the obligation to pay insurance premiums, is not a matter to be taken into consideration in the course of determining the validity of the Lapse Clause.

Then Y appealed to the Supreme Court.

Opinion:

The Decision of Tokyo High Court is quashed and remanded.

"[W]e cannot affirm the holdings of the court of prior instance in which the court regarded the due date of payment for the second and subsequent installments of insurance premiums under the Insurance Contracts as the last day of the grace period and found the Lapse Clause to be void under Article 10 of the Consumer Contract Act, on the following grounds."

"(1)According to the facts mentioned above, it is clearly stipulated in the General Conditions that the second and subsequent installments of

insurance premiums should be paid within the due month of payment, which therefore clearly means that the due date of payment of the second and subsequent installments of insurance premiums is the last day of each due month of payment. The grace period stipulated in the General Conditions should be understood as postponing the lapse of the insurance contract arising from default in the obligation to pay insurance premiums, until the last day of the month following the due month of payment. Assuming so, the Lapse Clause is interpreted as providing that the insurance contract shall lapse if the insurance premiums due are not paid within the due month of payment and if such default in the obligation to pay insurance premiums remains even within the additional one-month period (the grace period)."

"(2) The Lapse Clause thus provides that the insurance contract shall lapse in the event of nonpayment of insurance premiums, without making demand of performance (Article 541 of the Civil Code), irrespective of whether such nonpayment takes place only once or more often, and in this respect, as compared to the case where optional provisions apply, this clause restricts the rights of the policyholder, who falls within the scope of consumers."

"In connection with this, we examine whether or not the Lapse Clause is regarded as a clause that impairs the interests of consumers unilaterally against the principle of good faith."

"Demand of performance prescribed in Article 541 of the Civil Code functions to remind the obligor of his/her default and gives him/her an opportunity to perform the obligation before the contract is cancelled. In the case of such a contract as the Insurance Contracts, under which insurance benefits shall be provided upon the occurrence of an insured event, nonpayment of insurance premiums would not cause suspension of counter-performance, and therefore it is highly likely that the policyholder would fail to become aware of his/her default in the obligation to pay insurance premiums. In light of this, the disadvantage that the policyholder could suffer from the Lapse Clause, which provides that the insurance contract shall lapse without demand of performance that fulfills the abovementioned function, is not of a minor nature."

"However, according to the facts mentioned above, it is clearly provided under the Insurance Contracts that insurance premiums should

be paid within the due month of payment, and that a delay in payment shall not immediately result in the lapse of the insurance contract but the insurance contract shall lapse only if such default in the obligation to pay remains for a certain period of time. What is more, such period of time is set as one month, which is longer than the period of demand of performance required under Article 541 of the Civil Code. In addition, the Insurance Contracts are also accompanied by the Automatic Premium Loan Clause which provides that if the amount of insurance premiums, etc. payable does not exceed the amount of surrender value, Y shall automatically loan an amount equivalent to the insurance premiums to the policyholder so as to have the insurance contract survive validly, thereby ensuring that the insurance contract, for which insurance premiums have been paid for a long period of time, will not lapse easily by reason of nonpayment of only one installment of the insurance premiums. Thus, due consideration is being given to some extent to protecting the rights of the policyholder even in the event of nonpayment of insurance premiums."

"Furthermore, Y asserts that the Lapse Clause is designed on the premise of the implementation of an operational procedure of sending a reminder for payment of insurance premiums upon the policyholder before the lapse of the contract in the event of default in the obligation to pay insurance premiums. Supposing that Y, by the time of the conclusion of the Insurance Contracts, had set up and put into implementation with certainty an operational procedure of sending a reminder for payment of insurance premiums to the policyholder before the lapse of the contract in the event of default in the obligation to pay insurance premiums, the policyholder could have ordinarily become aware of his/her default in the obligation to pay insurance premiums. In view of the special characteristics of an insurance contract, which is to be entered into with a number of policyholders, if it is found that, in addition to including the clauses described ... above in the General Conditions, while giving due consideration to some extent to protecting the rights of the policyholder in the event of the policyholder's nonpayment of insurance premiums, Y has implemented the said operational procedure with certainty and then applied the General Conditions, the Lapse Clause is not regarded as a clause that impairs the interests of consumers unilaterally against the principle of good faith."

And there is a dissenting opinion by Justice SUDO Masahiko. The dissenting opinion says as follows; "even if it is found that the insurance company implements the operational procedure of sending a payment reminder with certainty in addition to stipulating the Clauses on Consideration to the Policyholder, these measures are still insufficient to prove that the policyholder, who is a consumer, is legally guaranteed a status that is equal to where he/she is able to receive a demand of performance under Article 541 of the Civil Code and resolve his/her default. After all, it must be said that the General Conditions lead to the consequence where the insurance company, which is a business entity, gives preference exclusively to its own interest, without giving due consideration to the legitimate interests of the policyholder, who is a consumer, thus impairing the fundamental and material interests of the consumer. Consequently, the Lapse Clause is regarded as a clause that impairs the interests of consumers unilaterally against the principle of good faith, and therefore it is void under not only the first sentence but also the second sentence of Article 10 of the Consumer Contract Act."

Editorial Note:

Such a Lapse Clause, the validity of which had been questioned in this case, is commonly used in the insurance industries. Thus if courts had denied the validity of the Lapse Clause, the impact of such decision on the insurance industries would have been enormous. Therefore, the decision of the Supreme Court had been concerned by lawyers and practitioners.

The issue of this case has been whether or not the facts or circumstances which are not stipulated in the clause of the contract (extra-clause facts) should be considered in course of determining whether the clause is void under the Article 10 of the Consumer Contract Act. Tokyo High Court had decided that such extra-clause facts should not be considered, stating that whether or not Y had adopted the operational procedure of sending a reminder for payment of insurance premiums to the policyholder before the lapse of the contract in the event of default in the obligation to pay insurance premiums, is not a matter to be taken into consideration in the course of determining the validity of the Lapse Clause. It could be said that Tokyo High Court had considered the Lapse Clause abstractly (i.e. irrelevantly to the extra-clause facts).

After the publication of the decision of Tokyo High Court, arguments over the reasonableness of that decision have arisen in academic and practical circles. Contrary to the decision of the Tokyo High Court, in the academic circles, the view that the extra-clause facts would be considerable to determine the validity of that clause under Article 10 of the Consumer Contract Act is dominant. Then much of scholars and practitioners have declared doubts about the decision. The Supreme Court, then, quashed and remanded that decision of Tokyo High Court, stating that if "Y has implemented said operational procedure with certainty and then applied the General Conditions, the Lapse Clause is not regarded as a clause that impairs the interests of consumers unilaterally against the principle of good faith." By the decision of the Supreme Court, it has become clear that the extra-clause facts would be considered to determine the validity of the clause under the Article 10 of the Consumer Contract Act. Since the decision of the Supreme Court has been consistent with the trend of the academic and business circles, most of the scholars and practitioners seem to be favorable to that decision.

It seems that, however, there are some problems which need to be considered further with the opinion. For example, should the facts or circumstances which are to be considered to determine the validity of the clause exist at the time of the conclusion of the contract? In other words, will the facts or circumstances which have arisen after the conclusion of the contract be considered? And if not, why? Reading the decision of the Supreme Court literally, it seems that the Supreme Court has considered that only the facts or circumstances which had existed at the time of the conclusion of the contract would be considered to determine the validity of the clause. (The Supreme Court has used the words; "by the time of the conclusion of the Insurance Contracts.")This problem has not been examined consciously so far. Therefore, further exploration on this point is necessary.

And it should be added that the decision of the remanded Court was published on October 25, 2012. That decision has followed the opinion of the Supreme Court and admitted that the Lapse Clause was valid because Y had implemented certainly the operational procedure of sending a reminder for payment of insurance premiums.

The decision of the Supreme Court on this case has its English text at

the website of the Supreme Court. The Summary, Facts and Opinion in this Note are extracts from it. For more details, please see their website:

http://www.courts.go.jp/english/judgments/text/2012.03.16-2010.-Ju-.No..332.html

3. Family Law

X v. Y
Tokyo High Court, October 18, 2012
Case No. (ra) 1926 of 2012
2164 Hanrei Jiho 55; 1383 Hanrei Taimuzu 327

Summary:

In respect to the conflict in handing over a child between a husband and wife, a temporary restraining order prior to adjudication in the family court regarding the handing over was quashed before its enforcement without enough compelling necessities for the compulsory execution to issue it.

Reference:

Domestic-Relations Adjudication Act, Article 15-3, Paragraph 6 and 7, Civil Provisional Remedies Act, Article 23, Paragraph 2

Facts:

Y (opponent, appellant: father, a company employee, yearly income of 4.4 million yen) married X (petitioner, appellee: mother, a part-time employee, monthly income of 80,000 yen) in 2007, delivered a child (a boy, 4 years old) in 2008, and bought a new house. As X and Y did not get along with each other and had many fights, X left a signed and sealed notification of divorce at home and left the house with their child in March 2012. They went to X's parents' house to live, (X's father (60 years old), mother (58 years old), and elder brother (35 years old) were living together), and have been living separately from Y since then.

Y met the child twice after the separation, and one afternoon in May