Summary:

The Japanese Civil Code which was enacted in 1898 comprises of ‘general provisions,’ ‘property law,’ ‘law of obligations,’ ‘family law’ and ‘law of inheritance.’ Since 2006, the ‘law of obligations’ has undergone a process of comprehensive revision. This paper examines and evaluates the proposal of the ‘Civil Code (Law of Obligations) Reform Commission’ in its ‘Basic Reform Policy (Draft Proposal) 2009, to incorporate certain rules in the existing ‘Consumer Contract Act’ into the ‘Civil Code’.

1. Introduction

The Japanese Civil Code is a comprehensive Code which is composed of five Books. Book I is the General Part which stipulates the basic rules of civil law, covering capacity of natural persons and juridical persons, juristic acts, agency, and prescription. Book II covers property and real security rights. Book III covers the law of obligations, including contract law, tort law, and unjust enrichment. Book IV deals with family relations and Book V prescribes laws on inheritance.

The present Civil Code was enacted in 1896. It was only after the Second World War that Book IV and V, which deal with family law and inheritance law respectively, were amended totally, with the aim of democratizing family relationship and promoting gender equality. Book I, II and III have not been substantially amended since enactment. However, since 2006, serious effort has been made to revise comprehensively some related chapters of Book I and III regarding ‘contract law.’
The ‘Civil Code (Law of Obligations) Reform Commission’ (hereinafter ‘Commission’) was established in 2006. In its report entitled ‘Basic Reform Policy (Draft Proposal) 2009,’ the Commission proposed to incorporate several rules covered by the existing ‘Consumer Contract Act’ into the Civil Code. This paper will evaluate the Commission’s proposal on this matter: ‘Should the Consumer Protection provisions be incorporated in the Revised Japanese Civil Code?’

2. Civil Code and Consumer Contract Act

In the Civil Code, it is generally assumed that a ‘citizen’ is recognized as a ‘reasonable, willful, strong and wise human being.’ Therefore, citizens should have ‘equal relationship,’ which is the prerequisite for the principle of ‘freedom of contract.’ However, in reality, there is a gap between the quantity of information and the negotiating power of different contract parties. A party with dominant negotiating power can manipulate unfair content into contracts. Therefore, special laws were enacted in response to the unjust effects of ‘party autonomy’ or ‘freedom of contract’. These laws inevitably modified certain rules in the Civil Code.

For example, sales contract where one party involves a consumer may be regulated by consumer law, such as ‘Consumer Contract Act,’ ‘Installment Sales Act,’ or ‘Act on Specified Transaction.’ Likewise, in terms of loan contracts, ‘Interest Restriction Act’ and some other related statutes are applied to regulate high interest rates. Lease contracts which deal with real property may be regulated by ‘Act on Land and Building Leases’ to protect the lessee who is considered to be weaker actor, while employment contract are governed by labor law to protect employee who has less bargaining power. The question is: why would the Commission only propose incorporating the ‘Consumer Contract Act’ and not other acts, into the Civil Code? A thorough study into the contents of the ‘Consumer Contract Act’ is needed in order to understand its relations with the Civil Code.

2.1 Consumer Contract Act (enacted in 2001)

This section examines the contents of Consumer Contract Act that are
considered particularly important and directly related to the purpose of the Civil Code amendment.

2.1.1 Purpose (Article 1)

It is stated in Article 1: ‘The purpose of this Act is to protect the interests of consumers, and thereby to contribute to the stabilization and improvement of the general welfare of the people’s life and to the sound development of the national economy—in consideration of the gap in quality and quantity of information and in the negotiating power between consumers and business operators.’

2.1.2 Definitions of Consumer Contract (Article 2)

Article 2 states the definition of ‘Consumer,’ ‘Business operator’ and ‘Consumer Contract.’

‘Consumer’ in this Act means individual(s) (however, the same shall not apply in cases where the said individual becomes a party to a contract as a business or for the purpose of business).

‘Business Operator’ refers to ‘juridical person(s), association(s) and individual(s) who become a party to a contract as a business or for the purpose of business.’

‘Consumer contract’ refers to contract(s) concluded between consumers on the one hand and business operators on the other. It is also important to note that provisions in this Act apply to any contracts except for ‘labor contracts’ (Article 48).

2.1.3 Fairness in the contractual process (Article 4)

This is one of the substantial parts in this Act. The consumer is given the right to rescind the contract when the manifestation of intention was made due to ‘specified mistake’ or ‘distress’ resulting from the inappropriate soliciting conduct of the business operator.

Taking these in turn, firstly, the consumer may rescind his/her manifestations of intention to offer or accept the consumer contract if the
consumer makes any of the specified mistakes as a result of the business operator: ‘represent[ing] that which is not true’ as to an important matter to conclude a contract (Article 4(1)(i)), ‘provid[ing] conclusive evaluations’ of future prices, of amounts of money which are uncertain (Article 4(1)(ii)), and not ‘intentionally represent[ing] disadvantageous facts’ that the consumer would normally consider to be non-existent by such representation (Article 4(2)).

Secondly, the consumer may also rescind their manifestations of intention to offer or accept a consumer contract if the consumer is distressed as a result of the business operator’s conduct: ‘not to leave a place’ where a consumer resides or does business even s/he requests to do so (Article 4(3)(i)), and ‘not to allow a consumer to leave a place’ of the negotiation even s/he requests to do so (Article 4(3)(ii)).

2.1.4 Fairness of the contents of contract (Articles 8-10)

Some clauses of consumer contract which unfairly impair the interest of the consumer shall be voided under the following articles:

(i) Clauses that totally or partially exempt a business operator from liability to compensate damages to a consumer for loss arising from the business operator’s non-performance, tort, etc are void (Article 8).

(ii) Clauses that stipulate the amount of damages or fix a penalty are void to the extent that the amount exceeds the average amount of damages which may be caused by the cancellation of a contract of the same kind (Article 9).

(iii) Clauses ‘which restrict the rights of consumers or expand the duties of consumers ⋅⋅ and which, impair the interests of consumers unilaterally ⋅⋅ are void.’ (Article 10)

2.1.5 Consumer Class Action (Article 12-35)

This part was promulgated in June 2006, and enforced in June 2007. The related articles allow some specific consumer organizations to file an injunction action against unfair acts of business operator in order to protect the interest of the consumers as a whole.
2.2 Relations between Civil Code and Consumer Contract Act

There is an inter-linked and supplementary relationship between the current Civil Code and Consumer Contract Act. Two contractual rules in the Civil Code has been amended and supplemented by the Consumer Contract Act. The first relates to the manifestation of intention, and the second to unfair terms.

2.2.1 Manifestation of Intention

In the Civil Code, Article 96 (Fraud or Duress) states that ‘(1) Manifestation of intention which is induced by any fraud or duress may be rescinded.’ Therefore, when the business operator intentionally deceives the consumer, or forces the consumer to conclude a contract under some pressure, the consumer can rescind those contracts under Article 96. However, the consumer is then required to prove that the business operator had the ‘intention’ to engage in fraud or duress at the moment of contracting. This need to prove such a subjective fact, namely, the business operator’s state of mind, poses a major hurdle for the consumer.

We have seen that article 4 of the Consumer Contract Act allows the consumer to rescind the contract when his or her manifestation of intention was due to ‘specific mistake’ or ‘duress’ induced by certain inappropriate soliciting conduct of the business operator. The requirements of rescission under article 4 are more relaxed than those stipulated under Article 96 of Civil Code (i.e. ‘rescission due to fraud’ and ‘rescission due to duress’). The consumer only needs to prove some specific ‘actions’ of business operator listed in Article 4 to rescind the contract. In the case of ‘Specified Mistake’ of consumer induced by business operator, the consumer just needs to prove that it occurred as a result of the business operator ‘representing what is not true,’ ‘providing conclusive evaluations,’ or ‘not intentionally representing disadvantageous facts’. In the case of ‘Distress’, the consumer just needs to prove that the business operator was ‘not leaving a place where consumer is’, or ‘not allowing consumer to leave a place.’ It is much easier for consumer to prove such objective factor (some specific actions of business operator).
2.2.2 Unfair Terms

With regards to unfair terms, the Civil Code Article 90 (Public Policy) states that ‘A juristic act with any purpose which is against public policy is void.’ Contract is one of the components of ‘juristic acts’ so that any contract or any term of a contract may be totally or partially voided if it is considered as ‘against public policy.’ However, this is simply a general provision (standard) and it is subject to judicial discretion.

On the other hand, there are more specific provisions in the Consumer Contract Act, that could make a contract void for unfair terms: Article 8 (some exemption clauses), Article 9 (some liquidated damages or penalty clauses), and Article 10 (some clauses unfairly impairs the interest of consumer).

2.2.3 Summary

When there is a difference in the quantity of information and an imbalance in the negotiating power between the parties, it is necessary to assure fairness in the process and the contents of the contract. In this respect, the provisions of the ‘Consumer Contract Act’ of Japan might not be necessarily comprehensive, but it is highly important to have legislation like this. Hence, it is suggested that the ‘consumer protection’ provisions be incorporated into Civil Code.

3. Civil Code Reform Commission’s Proposal and Evaluation

3.1 The Commission’s proposal

The Commission made several proposals to revise the Civil Code; two main issues needs to be examined further.

3.1.1 Expansion on provisions on manifestation of intention.

Two proposals were made to import the special provisions for consumers under the Consumer Contract Act into the Civil Code. Proposal [1.5.18] is based on Article 4(1)(ii) of Consumer Contract Act and Proposal [1.5.19] is based on Article 4 (3) of the same Act.
【1.5.18】(Special provisions on consumer contracts – misconception based on the provision of a conclusive evaluation) ⁶)

(1) At the time of the business operator soliciting for the conclusion of a consumer contract, if through providing the consumer with a conclusive evaluation on uncertain items with regard to the goods, rights, services or other things which were the object of such consumer contract, the consumer was under the misconception that the details of the conclusive evaluation so provided were definite and, through such misconception, manifested an intention to offer or accept the consumer contract, such manifestation of intention may be rescinded.

(2) If a third party provided the consumer with the conclusive evaluation in (1), the manifestation of intention to offer or accept such consumer contract may be rescinded only when falling under one of the following items: (a) Such third party serves as the representative or some other person of such business operator and the business operator is the person who should bear responsibility for such act; or (b) At the time of the consumer manifesting the intention to offer or accept the consumer contract, the business operator knew or could have known that the third party had provided a conclusive evaluation.

(3) A representative for the consumer pertaining to the conclusion of the consumer contract (including sub-agent (including those persons who are appointed as sub-agents through two or more layers)) is deemed to be the consumer with regard to the application of (1) and (2).

(4) The rescission of the manifestation of intention for the offer or acceptance of a consumer contract pursuant to (1), (2) and (3) may not be asserted against a third party without knowledge or fault.

【1.5.19】(Special provisions on consumer contracts – distress) ⁷)

(1) At the time of the business operator soliciting for the conclusion of a consumer contract, aside from when falling under one of the following acts, if the business operator continued to solicit the consumer despite the consumer indicating a desire to the effect that continuation of the solicitation was unwanted, and through the business operator continuing the solicitation the consumer was distressed...
Further to the above proposals, the Commission tried to reconstruct the Civil Code into a general rule not limited to consumer contracts in its proposal [1.5.15] (Misrepresentation) as a replacement to Article 4(1)(i) of Consumer Contract Act, as below:

【1.5.15】(Misrepresentation) ⑧)

(1) With regard to a manifestation of intention made to the other party, in cases where the other party made a representation which differed from fact regarding matters which would ordinarily influence the decision of the person manifesting the intention as to whether or not to make the manifestation of intention, and such person manifested an intention based on an incorrect understanding of the facts, such manifestation of intention may be rescinded.

(2) With regard to the manifestation of intention made to the other party, in cases where a third party made a representation which differed from fact regarding matters which would ordinarily influence the decision of the person manifesting the intention as to whether or not to make the manifestation of intention, and such person manifested an intention based on an incorrect understanding of the facts, such manifestation of intention may be rescinded only when falling under one of the following items: (a) The third party serves as a representative for the other party or is some other person for whose act the other party should bear responsibility; or (b) At the time of the person manifesting the intention making the manifestation of
intention, the other party knew or could have known that the third party had made a representation to the person manifesting the intention which differed from fact. (3) The rescission of the manifestation of intention pursuant to (1) and (2) may not be asserted against a third party who is without knowledge or fault. * Cases falling under Article 4, paragraph 2 of the Consumer Contract Act (failure of notification of a disadvantageous fact) would constitute the ‘misrepresentation’ denoted here, and therefore rescission would be permitted in accordance with [1.5.15], but one view was also expressed that it would be preferable to explicitly confirm to such effect.

3.1.2 To include provisions on Regulation of Unfair Terms

There is a proposal to establish a provision regulating unfair terms in the Civil Code, as in Proposal [3.1.1.32](General provisions relating to the effect of unfair terms).

【3.1.1.32】(General provisions relating to the effect of unfair terms)

(1) A term of general conditions or consumer contracts (excluding the terms of a consumer contract adopted through the process of individual negations) is void if, when compared to cases where such term does not exist, the term harms the interests of the counterparty to the person supplying the term to the degree of violating the principle of good faith.

(2) When judging whether or not such term injures the interests of the counterparty to the degree of violating the principle of good faith, in cases where business customs or discretionary provisions exist relating to the nature of the contract or the intent of the contract, the attributes of the parties or contracts of the same type, such contents shall be taken into consideration.

It should be noted that this proposal is intended to apply to both consumer contract and non-consumer contract. There are also several proposals to prepare lists of unfair terms. The Commission proposes two types of list of unfair terms.

The first list is applied common to general conditions (non-consumer
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contract) and consumer contract [3.1.1.B]. Examples of terms ‘deemed to be unfair terms’ and ‘presumed to be unfair terms’ are listed in [3.1.1.33] and [3.1.1.34] respectively.

The second list would only apply to the terms of consumer contracts [3.1.1.C]. Examples of terms ‘deemed to be unfair terms’ and ‘presumed to be unfair terms’ regarding consumer contracts are listed in [3.1.1.35] and [3.1.1.36] respectively.

3.2 Evaluation and criticism

There are three of the possible approaches to reform the relationship between the Civil Code and Consumer related laws. Firstly, to keep Civil Code and Consumer related laws separate; this is the stance taken by the existing Japanese law. Secondly, to incorporate the consumer related laws into the Civil Code: this is the approach of the German Civil Code, which was amended in 2002. Thirdly, to pursue and construct a ‘Consume(r) Code,’ similar to that of the French law chose when ‘Code de la Consommation’ (Consumer Code) was enacted in 1993.

The Committee’s Proposal seems to shift the stance of Japanese Civil Code from the first approach to the second approach. However, several problems may arise and the amendment needs further consideration before incorporating the Consumer Contract Act into the Civil Code. Two matters relate to practical problems, and two issues relate more to theoretical problems.


This amendment risks jeopardizing the development of Consumer Contract Act in the future. Consumer laws have a nature and tendency to be amended more flexibly according to the needs of time, but amendment may be more difficult once they are incorporated into the fundamental laws, such as Civil Code if it is assumed that any amendments will be automatically imported into the Civil Code.
(2) Affect jurisdiction and administration of Consumer Affairs Agency (CAA).

The ‘Consumer Affairs Agency’ (CAA) was established in 2009 with the aim of protecting and enhancing consumer benefit. Its jurisdiction covers a broad range of consumer protection including trade, labeling and safety of product. All consumer related acts or regulations are controlled by CAA.

However, if the Consumer Contract Act be incorporated in Civil Code, the jurisdiction would be shifted to the Ministry of Justice and this might go against the purpose and policy of CAA establishment and raise potential conflict between the CAA and the Ministry of Justice.

(3) Why only benefit consumers, and not also labors or tenants in the Civil Code?

The reason consumers are protected is because they are regarded as a weak entity who need protection from the government. However, this logic or reasoning should also be applied to labors [laborers/employees] and tenants who also need protection. So, why has the Commission omitted these other groups in this amendment?

(4) Why include only certain rules of ‘Consumer Contract Act,’ and not other consumer related acts into the Civil Code?

The Commission’s proposal is to incorporate only the Consumer Contract Act but not other consumer related acts, such as ‘Installment Sales Act’ and ‘Act on Specified Commercial Transactions’, which are equally important in resolving consumer problems.

For example, consumers may rescind the contract not only by way of ‘fraud,’ ‘duress,’ ‘misrepresentation’, but also during the ‘cooling-off period.’ This consumer right to rescind the contract within 8 days of the transaction being made is stipulated in the Act on Specified Commercial Transactions (in Article 9) and in the Installment Sales Act (in Article 4-4).

Therefore, from the viewpoint of the “expansion of provisions on manifestation of intention,” it is unreasonable to neglect the rule allowing a cooling-off period from the Commission’s proposed reform of the Civil Code.
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It would make the whole situation unclear with regards to the rescinding of the manifestation of intention. Furthermore, it would undermine the ‘basic policy’ of the Commission to make the Civil Code understandable to the public.

4. Conclusion

There is no clear definition of ‘Code’ in Japan, but the role of the ‘Code’ seems to show ‘how the law ought to be’, and not ‘how the law is.’ From this respect, it would be like ‘a voyage without a chart,’ if we try to reform Civil Code without discussing the direction and principles of the reform.

It is important to consider how to position the provisions in the Consumer Contract Act in relation to the Civil Code and what kind of basic stance should be taken in resolving issues, especially relating to ‘inequality between contractual parties’ and ‘the structure of manifestation of intent’ in the new Civil Code.

Notes

1) The Japanese ‘Civil Code (Law of Obligations) Reform Commission’ (‘Commission’) was established in 2006. This Commission is purely a private research group consisting of academics, led by Takashi Uchida, a former professor of law of Tokyo University. On March 31, 2009, the Commission devised a ‘Basic Reform Policy (Draft Proposals)’, and published it on 8th May 2009. Shortly afterwards, counterproposals against this Policy Draft were made by other academic groups and several bar associations. On October 28, 2009, the Legislative Council of the Ministry of Justice decided to establish ‘Working Group on the Civil Code (Law of Obligations).’ This Working Group has studied and deliberated the Civil Code reform relating to law of obligations. From November 2009 to September 2010, 15 meetings were held. This Group is expected to produce a report on the basic policy for the reform by March 2011. The procedure to seek public opinion widely started from April 2011. According to the Draft Proposals, there are four reasons to reform the Law of Obligations in the Civil Code, i.e. (i) to make the Civil Code more understandable to the public, (ii)
to modernize the Civil Code by putting case law theories in the statutory form, (iii) to generalize some rules under the Consumer Contract Act in the Civil Code, and (iv) to harmonize the Civil Code with the transaction rules of other countries.

2) A full English translation of ‘Consumer Contract Act’ can be obtained from the following website: http://www.consumer.go.jp/english/cca/index.html

3) A full English translation of ‘Civil Code (Part I, Part II, and Part III)’ can be obtained from the following website: http://www.japaneselawtranslation.go.jp/law/detail/?id=1928&vm=04&re=01&new=1

4) Ibid.

5) The English version of the Draft Proposals of the Reform Commission can be obtained from the following website: http://www.shojihomu.or.jp/saikenhou/English/draftproposals.html


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