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Author(s)	Takizawa, Masahiko
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## CONSUMER PROTECTION IN JAPANESE CONTRACT LAW\*

MASAHIKO TAKIZAWA

This short report presents a survey of consumer protection under Japanese contract law. In Japan, the Consumer Contract Act was enacted in 2000, but even before this, some acts provided special remedies for consumers. Therefore, it is appropriate to divide this report into two parts, namely, before and after the Consumer Contract Act.

Before discussing Japanese contract law, I'd like to confirm the nature of the problem — the necessity for consumer protection under contract law. In Japan, although I believe the situation is almost the same in Australia, between consumers and businesses, there are considerable gaps in the quality and quantity of information and in the negotiating power (Consumer Contract Act Article 1 points out this situation). Regarding the latter point (the gap in negotiating power), we must not forget the fact that most contracts between consumers and businesses are made by means of standard contracts, for which two problems can be identified. First, many consumers fail to read the contract before agreeing to it, and even if they do read it, it can be too complicated for the consumer to understand, as is the case with insurance policies. Second, the standards are prepared by the businesses before the negotiation begins, and it is practically impossible for the consumers to ask for an amendment of the terms, which means that those terms are not negotiated. For these reasons, there can be unfair terms in contracts between consumers and businesses, hence the need for special protection for consumers.

### I. *Before 2000*

As in most other countries, Japanese civil law declares any contracts that are against public policy to be void<sup>1</sup>, so this can help consumers in extreme cases. However, this is not sufficient, because it is too ambiguous.

After World War II, various types of sales emerged, and these gave rise to many conflicts. One of the early examples is the hire-purchase contract. In those days, with hire-purchase contracts, usually the interest was calculated based on the total amount borrowed for the period of the loan. But this is unfair, because the consumer repays in monthly installments, which means he does not owe the whole amount for the entire period. This calculating method does not consider this fact and the consumer is not aware of this. So the Japanese Hire-Purchase Act of 1961 provides that the seller must deliver a written document to the consumer and clearly

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<sup>1</sup> Japanese Civil Code Article 90

describe the actual rate<sup>2</sup>. Today this is the same with door-to-door sales<sup>3</sup>.

When the consumer goes to the business place of the seller, he has time to prepare to negotiate, but, when a salesman suddenly arrives at the residence of the consumer, as in door-to-door sales, the consumer has no time to prepare. In such cases, the consumer is apt to buy goods that are not really needed. So the law provides consumers with the right to cancel the contract within 8 days (cooling-off period)<sup>4</sup>. The Hire-Purchase Act was also amended in this way<sup>5</sup>.

The third problem was credit sales. When the delivered goods do not comply with the terms of the contract, you can claim against the seller, but how can you claim against the creditor? Some Japanese courts decided that you cannot raise a claim against the creditor<sup>6</sup>, and this gave rise to many disputes. Finally, the Hire-Purchase Act was amended, and consumers won the right to claim against the creditor as well as against the seller<sup>7</sup>.

Recently, many other types of sales have arisen, for example, mail-order sales and telephone sales, so the former Door-to-Door Sales Act was amended to cover them, thus the rather strange name for the act; Act Regulating Some Specified Types of Sales.

This was the situation before 2000. Some acts provided special remedies for consumers, but the scope of each act was limited to a specified type of sales—hire-purchase or door-to-door sales and so forth. Moreover, each act applied only to the specified goods named by the Ministry of Economy, Trade and Industry. Although the list of the goods is very wide, these acts do not apply to all goods. And, the remedies cannot be applied out of this limited scope; for example, the Japanese Supreme Court decided that the Hire-Purchase Act Article 30-4 (claim against creditor) cannot be applied to goods that are not named by the ministry<sup>8</sup>. So, we needed a general consumer protection law that applies regardless of the types of sales or goods sold.

## II. *Consumer Contract Act of 2000*

In 2000, the Consumer Contract Act, which is to be applied to every contract between consumers and businesses, was enacted. By means of this act, consumers have the right to avoid contracts, when they are mistaken or distressed by certain acts of businesses, and nullify clauses that exempt businesses from liability for damages or when otherwise unfair.

### 1. **Avoidance of Consumer Contracts**

According to Article 4 paragraph 1 of the Consumer Contract Act, a consumer can avoid a contract, when, during negotiating the contract, the business represents something that is not true as to a material item (items that normally impact a consumer's decision to conclude a

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<sup>2</sup> Hire-Purchase Act Article 4

<sup>3</sup> Act Regulating Some Specified Types of Sales (former Door-to-Door Sales Act of 1973) Article 4

<sup>4</sup> Act Regulating Some Specified Types of Sales Article 9

<sup>5</sup> Hire-Purchase Act Article 4-4

<sup>6</sup> For example, Tokyo High Court 1982.12.27. NBL 294.38.

<sup>7</sup> Hire-Purchase Act Article 30-4

<sup>8</sup> 1990.2.20 Hanrei-Jihou 1354.76.

contract) and the consumer makes the mistake that it is true (paragraph 1 section (1)). When someone has intentionally deceived you, you can avoid the contract by means of Civil Code Article 96. But, when a business has no intention to deceive, for example, when they believe their representation to be true, this does not amount to fraud and the Civil Code cannot be applied. In such cases the Consumer Contract Act can be a help to the consumers, because they don't have to prove the business's intent to deceive.

When a business intentionally fails to represent disadvantageous facts as to material items and the consumer mistakenly believes in the non-existence of such facts, also in these cases, the consumer can avoid the contract (paragraph 2). But this applies only to the intentional failure to represent facts.

And, as for goods, rights or services, which change their value in the future, for example, securities or derivatives, when the business provides conclusive evaluations of future prices and the consumer makes the mistake that the conclusive evaluation is certain, then he can avoid the contract (paragraph 1 section (2)). Under the Japanese Securities Law it is forbidden to provide conclusive evaluations, but the Consumer Contract Act goes further and provides the consumers with the right to avoidance in such cases.

Finally, a consumer can avoid the contract when the negotiation takes place in the residence of the consumer, and, in spite of the consumer's request to leave the place, the business does not comply, thus causing the consumer distress (Consumer Contract Act Article 4 paragraph 3 section (1)). This applies also in cases when the consumer wants to leave the place of negotiation, but the business does not allow him to leave and causes him to become distressed (paragraph 3 section (2)). If the business forces the consumer to conclude a contract, he can avoid the contract by virtue of Civil Code Article 96, but in these cases, in which the consumer is distressed, it can be difficult to prove that the consumer was forced. On this point, the Consumer Contract Act helps the consumers. Article 4 is the most frequently used provision in this Act.

## 2. Nullification of Consumer Contract Clauses

The exemption clauses, which exempt businesses from liability for damages, are not necessarily void, but, regarding the gap in negotiating power between consumers and businesses, Article 8 of the Consumer Contract Act declares clauses that unfairly exempt businesses from liability, to be void. For example, clauses that totally exclude a business from liability arising from a business's non-performance (section (1)), or, clauses that partially exclude a business from liability arising by intent or gross negligence on the part of the business (section (2)), and so forth.

Also, clauses that stipulate the amount of damages or fix the penalty may be void. Generally speaking, such clauses are valid under Japanese Law<sup>9</sup>, but, according to Article 9 of the Consumer Contract Act, when the said amount exceeds the average amount of damages by the rescission of a contract of the same kind, the part of the clause that exceeds the average amount is void. For example, when you make a restaurant reservation and cancel it later, normally you are required to pay a fee, but, in one case, this amount was so high that it exceeded the total amount of the costs of the planned party. In this case it would be cheaper

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<sup>9</sup> Japanese Civil Code Article 420

not to cancel but to simply not go to the restaurant on the appointed day. Of course it was held that this is a violation of the Consumer Contract Act<sup>10</sup>. As another example, when you are admitted to a university, usually you are required to pay the fees for the first semester in advance. If you are then admitted to a second university and decide to go to the second one, the first university does not pay back the fees because the student chooses not to go to the first university out of his own volition. But, according to the Consumer Contract Act Article 9, this can be unfair, because the fees certainly exceed the damages arising by the student's not going to the first university. When we were discussing the draft of this act, no one thought of using this act in this way, but nowadays there are many cases of this litigation<sup>11</sup>.

Thirdly, when the clauses of a consumer contract restrict the consumer's rights, which would otherwise be rendered to the consumer by application of the Civil Code and so forth, and these clauses impair the interests of the consumer one-sidedly, they are void (Consumer Contract Act Article 10). So the provisions of the Civil Code can work as a minimum standard of consumer protection, or as "implied terms," and amend the consumer contracts.

This new Japanese Consumer Contract Act is still unsatisfactory. For example, in many countries, consumer protection law declares clauses that are unexpected and a surprise to consumers to be void, but this is not the case in Japan. Many countries have a detailed list of void clauses, which are called blacklists or grey lists, but, as you see, the Japanese Act is too insufficient. Finally, although Article 3 of the Act declares that businesses have a duty to provide consumers with necessary information, it says nothing regarding the effect of failure to comply with this duty.

### III. *Conclusion*

Now, I'd like to summarize and highlight some characteristics of consumer protection under Japanese contract law.

- (1) Japanese law protects consumers by providing them with the right to avoid the contract or by nullifying unfair clauses. But, we rarely amend the clauses, for example, by means of the "implied warranty", although, when the law declares only part of clauses to be void, or, the provision of the Civil Code to be applied as a minimum standard, it can work as an amendment of the clauses.
- (2) Although consumers have some strong rights against businesses, for example, the right to a cooling off period, this is limited to contracts made by means of special types of sales (hire-purchase contracts or so) and related special goods named by the ministry.
- (3) The Consumer Contract Act can be applied to every contract between a consumer and business, but it is a very simple act.

Finally, I want to mention some current issues of consumer protection under contract law.

The first issue relates to the definition of a consumer. Can you call a small (or individual) business a consumer? For example, when they buy a telephone, they may use it for business as well as for private use. Recently some small businesses bought a new type of apparatus,

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<sup>10</sup> Tokyo District Court 2002.3.25 Kinyu-Shouji-Hanrei 1152.36.

<sup>11</sup> For example, Kyoto District Court 2003,7,16 Hanrei-Jihou 1825.46.

because they mistakenly believed that the telephone system was going to change and their phones would become obsolete. But it became clear later that this was a mistake. Strictly speaking, Japanese consumer law does not apply to this case, so they don't have the right to a period of cooling off, although this is disputed.

The second issue is consumer credit. Also in Japan, there are many shark lenders, so you can speak of the Japanese version of your "pay-day" problem. The Japanese regulations regarding interest are too complicated, so it will be amended into a simpler system. But I think the crux of the problem is not that of legal theory, but how to enforce it effectively. The victims don't go to court, and we don't even know the exact number of victims. Even when you have a complete theory, it doesn't help if you can't apply it. I regard this as one of the most important problems for the future.

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APPENDIX: **The Consumer Contract Act** (translated by Japanese Cabinet Office\*)

## **Chapter 1 General Provisions**

### **Article 1 (Purpose)**

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 discrepancy in quality and quantity of information and the negotiating power between consumers and business operators, 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 business operators, and nullifying any clauses, in part or in whole, that exempt the business operators from their liability for damages or otherwise that unfairly harm the interests of consumers, in addition to providing a right to qualified consumer organization to demand an injunction against business operators, etc. for the purpose of preventing the occurrence of or the spreading of damage to other consumers.

### **Article 2 (Definitions)**

- (1) The term "Consumer" as used in this Act shall mean individual(s) (however, the same shall not apply in cases where said individual becomes a party to a contract as a business or for the purpose of business).
- (2) The term "Business Operator" as used in this Act shall mean juridical person(s), association(s) and individual(s) who become a party to a contract as a business or for the purpose of business.
- (3) The term "Consumer Contract" as used in this Act shall mean contract (s) concluded between consumers on the one hand and business operators on the other.
- (4) The term "Qualified Consumer Organization" as used in this Act shall mean any juridical person certified by the Prime Minister pursuant to the provision of Article 13 as a consumer organization (which means the consumer organization pursuant to the provision of Article 8 of the Consumer Basic Act (Act No. 78, 1968). The same shall apply hereinafter) which has the qualifications necessary to exercise such rights to demand an injunction as governed by the provision of this Act in the interests of many and

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\* <http://www.consumer.go.jp/english/cca/index.html>, accessed at 2008/11/28, Chapters 3, 4 and 5 are omitted.

unspecified consumers .

### **Article 3 (Efforts of Business Operators and Consumers)**

(1) Business operators drafting clauses of a consumer contract shall endeavor to make the rights and duties of consumers and such other things set forth in the consumer contract clear and plain to consumers and in order to deepen consumer understanding when consumers are solicited to enter into consumer contracts, to provide necessary information about the consumer's rights and duties and such other things set forth in the consumer contract.

(2) Consumers entering into a consumer contract shall endeavor to actively use the information provided by business operators and to understand their rights and duties and such other things set forth in the consumer contract.

## **Chapter 2 Consumer Contract**

### **Section 1 Rescission of the Manifestation of Intention to Offer or Accept a Consumer Contract**

#### **Article 4 (Rescission of the Manifestation of Intention to Offer or Accept a Consumer Contract)**

(1) Consumers may rescind their manifestations of intention to offer or accept a consumer contract if said consumers make any of the specified mistakes set forth below as a result of any of the acts listed in the following items by a business operator at the time of being solicited to enter into such consumer contract by such business operator and thereby making said manifestation of intention.

(i) To represent that which is not true as to an important matter. Mistake that the content of said representation is true.

(ii) To provide conclusive evaluations of future prices, of amounts of money that a consumer should receive in the future and of such other uncertain items that change in the future with respect to goods, rights, services and such other things that are to be the subject of a consumer contract. Mistake that the content of said conclusive evaluation so provided is certain.

(2) Consumers may rescind their manifestations of intention to offer or accept a consumer contract if a business operator represents to said consumers the advantages as to important matters or things related to said important matters but intentionally fails to represent disadvantageous facts (limited to those facts that consumers would normally consider to be non-existent by such representation) at the time of solicitation by a business operator to enter into such consumer contract, as to important matters, and said consumers thereby mistakenly believe the non-existence of such facts. Provided, however, that this shall not apply where the business operator has attempted to make representations of such facts to said consumers and said consumers refuse to hear such attempted representations.

(3) Consumers may rescind their manifestations of intention to offer or accept a consumer contract if said consumers are distressed as a result of any of the following enumerated acts by a business operator made at the time of solicitation to enter into such consumer contract by such business operator.

(i) To fail to leave a place where a consumer resides or does business in defiance of the consumer's request to the business operator to leave such place.

(ii) Not to allow a consumer to leave a place where the consumer is solicited to enter into the consumer contract by the business operator in defiance of the consumer's request to said business operator to

allow him/her to leave.

(4) The term “Important Matter” as used in the item (i) of para.(1) and para.(2) shall mean the following items in a consumer contract that would normally affect a consumer’s decision whether to conclude a consumer contract.

(i) Quality, purpose of use and such other contents of objects of a consumer contract such as goods, rights and services

(ii) Price and such other conditions of a transaction of the objects of a consumer contract such as goods, rights and services

(5) The rescission of a manifestation of intention to offer or accept a consumer contract in paragraphs (1) to (3) may not be asserted against a third party without knowledge

#### **Article 5 (Third Parties Entrusted to Intermediate and Agents)**

(1) The preceding article shall apply mutatis mutandis to cases where a business operator entrusts a third party to intermediate a consumer contract between the business operator and a consumer (which shall be referred to simply as “entrustment” for purposes of this paragraph), and the third party (which includes a person entrusted by such third party (including any person who is entrusted through more than two layers of entrustment) who shall be referred to as “entrusted person, etc.” hereinafter) commits any acts set forth in paragraphs (1) to (3) of the preceding article with respect to a consumer. In this case, “the business operator” referred to in the proviso of para. (2) of the preceding article shall be deemed to be replaced with “the business operator or the entrusted person, etc. provided in para. (1) of the following article.”

(2) Any agent of a consumer (which includes a subagent (including any person appointed as a subagent through more than two layers). The same shall apply hereinafter), agent of a business operator and agent of entrusted person, etc. as above involved in the execution of a consumer contract shall be deemed to be the consumer, business operator and entrusted person, etc., respectively in the application of paragraphs (1) to (3) of the preceding article (including the case where it is applied mutatis mutandis pursuant to the preceding paragraph. The same shall apply in the following article and in Article 7).

#### **Article 6 (Interpretation Provision)**

The provisions in paragraphs (1) to (3) of article 4 shall not be interpreted to exclude the application of article 96 of the Civil Code (Act No. 89, 1896) to a manifestation of intention to offer or accept a consumer contract provided in these paragraphs.

#### **Article 7 (Limitation of the Right to Rescind)**

(1) The right to rescind provided for in paragraphs (1) to (3) of article 4 shall be extinguished by prescription, if not exercised within six months from the time when ratification became possible. The same shall apply if five years have elapsed since the time of the conclusion of a consumer contract.

(2) In the case where a consumer enters into a contract as a consumer contract to subscribe for shares or offer capital contribution, or to contribute funds that shall not be rescinded on the grounds of fraud or duress under the Corporate Code (Act No. 86, 2005) and other acts, a consumer cannot rescind his/her manifestation of intention of such subscription, offering or contribution pursuant to the provisions of paragraphs (1) - (3) of Article 4 (including the case where it is applied mutatis mutandis pursuant to para. (1) of Article 5).



## Section 2 Nullity of Consumer Contract Clauses

### Article 8 (Nullity of Clauses which Exempt a Business Operator from Liability for Damages)

(1) The following clauses of a consumer contract are void.

(i) Clauses which totally exclude a business operator from liability to compensate damages to a consumer arising from the business operator's default.

(ii) Clauses which partially exclude a business operator from liability to compensate damages to a consumer arising from the business operator's 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 operator, the business operator's representative or employee).

(iii) Clauses which totally exclude a business operator 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 operator's performance of a consumer contract.

(iv) Clauses which partially exclude a business operator 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 operator, the business operator's representative or employee) pursuant to the provisions of the Civil Code committed on occasion of the business operator's 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 a consumer contract (when a consumer contract is a contract for work, and there exists a defect in the material subject of a consumer contract for work The same shall apply in the following paragraph), Clauses which totally exclude a business operator from liability to compensate damages to a consumer caused by such defect.

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

(i) In the case 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 operator entrusted by the business operator or a contract between the business operator and another business operator for the benefit of the consumer, which is concluded before or simultaneously with the consumer contract, provides that the other business operator 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

### Article 9 (Nullity of Clauses which Stipulate the Amount of the Damages Paid by Consumers and such Other Clauses)

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 operator in

accordance with the reason, the time of the cancellation and such other things The part that exceeds the normal amount.

(ii) As to the clauses in a consumer contract which 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, every failure of payment is a default in 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% a 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.

#### **Article 10 (Nullity of Clauses that Impair the Interests of Consumers One-sidedly)**

Clauses which restrict the rights of consumers or expand the duties of consumers beyond those under the provisions unrelated to the public order applicable pursuant to the Civil Code, the Commercial Code and such other laws and regulations and which, impair the interests of consumers unilaterally against the fundamental principle provided in the second paragraph of article 1 of the Civil Code, are void.

#### **Section 3 Auxiliary Provisions**

##### **Article 11 (Application of Other Acts)**

(1) As to the effects of rescission of a manifestation of intention to offer or accept a consumer contract and of a clause in a consumer contract, the provisions of the Civil Code and the Commercial Code shall apply in addition to this Act.

(2) As to the effects of rescission of a manifestation of intention to offer or accept a consumer contract and of a clause in a consumer contract, if laws or regulations other than the Civil Code and the Commercial Code provide otherwise, such laws and regulations shall take priority.