

Points to remember for the Civil Code (law of obligations) reform (Summary of opinions at the 1st & 2nd Meetings)

○ Opinions at the 1st Meeting

◇ Opinions at the 2nd Meeting

1. Necessity to reform the Civil Code (law of obligations)

(Easily understandable Civil Code)

- It is a considerably important point of view to make the Civil Code easily understandable to the public.
- It is problematic that only those who adequately understand case law can use the Civil Code. It is necessary to make the Civil Code easily understandable to the public through putting case law theories in the statutory form.
- While the Civil Code is important in consumer consultation, current situation is considerably hard to understand for consumer consultants because legal practice is based on case law which are unwritten in the text of the Civil Code. It is necessary to change such situation and make the Civil Code easily understandable for these consumer consultants.
- Present state of operation of the Civil Code is not only hard to understand for the general public but also unclear even for legal professionals specialized in other adjacent legal areas. It is the situation that a broad range of people request the Civil Code reform so that the Code becomes easily understandable.
- Japanese Civil Code is simple and the number of article is small partly because the Civil Code was legislated within a short period of time in the Meiji Era. Case law and practice have added various rules on the Civil Code for its operation. While current practitioners may not feel any problem with this situation, it is necessary to make the Civil Code easily accessible and understandable to the next generation. In addition, putting these rules in the statutory form has another merit that Japanese law becomes transparent to foreign countries.
- ◇ Behind the small number of articles of the Civil Code, there was an intent to do so in response to the criticism that the old Civil Code had many definitions and classification-provisions as well as the context that it was legislated in a hurried manner. In addition, the situation which relevant substantive systems were not yet prepared barred to establish detailed provisions. We need to pay attention to such circumstances.
- How long do we leave the situation that there is no other choice but to explain to the students who are going to study law and the foreigners who wish to refer to Japanese law that provided articles and practice are different in Japanese law?

- It is important to put in the statutory form not only case law theories but also those rules which are unwritten but taken for granted to legal professionals, such as the rule that a claim is extinguished through payment. In addition, pursuing understandability will possibly suggest changing the writing style of provisions as a whole. From such point of view, it may be necessary to review the whole provisions related to law of obligations.
- ◇ As for those rules that general principles are provided but unclarity exists in applying to concrete situation, we should specify the content of provision by situation as much as possible. There are rules that not only general principles but also standards or guidelines need to be provided for practical operation.
- ◇ While whether the number of articles in the Civil Code is small or not can be disputed, the fact that *roppō* (collection of statutes) annexing relevant case laws is widely used explains that people cannot handle the Civil Code only with current articles.
- ◇ Although there always exists a tendency of clarification, emphasis on clarification makes provisions detailed and, in return for this, unclarity may occur because of the increased volume of the whole provisions or complex procedure of the reform. We need to keep in mind this possible downside.

(How the text of the Civil Code should be)

- There are likely two ways to establish the Civil Code provisions: one is the *haiku*-like model that short, condensed wording is flexibly interpreted, and the other is the prose or description-like model that detailed provisions are provided for various issues. For example, the right to request avoidance of fraudulent act is currently functioning with a small number of articles in the present Civil Code. It is doubtful that establishing detailed provisions will make the Civil Code easily understandable or contribute to appropriate operation.
- If provisions with abstract contents were one-sidedly good, the Civil Code would need the provision for the fair and equitable principle only. From the view on fostering foreseeability, it is better to clarify the contents of the Civil Code through adding provisions to some extent.
- Stabilizing current rules has one aspect that it will encumber the development of future interpretation. Therefore, it is good to examine how far we should establish articles at the present moment, paying due consideration to the future development of case law and discussion, based on individual issues with the consistency of fundamental philosophy in mind.
- ◇ We should pay attention to compile the provisions with clear and beautiful Japanese so that people would say, “if you study Japanese, you should read the Civil Code.”

(Correspondence to the changes of society and economy)

- It is necessary for businesses that the reform contributes to further facilitation of transaction and improvement of transactional foreseeability.
- Statutory interest rate which loses touch with the market interest rate has created harmful influences on real economic activities. It is necessary to review the whole provisions in order not to leave such provision which is obviously necessary to reform.
- For example, what the present Civil Code assumes in the area of sale is the sale of a specific thing such as immovable properties. However, today the importance of the sale for certain kinds of goods such as industrial products is increasing. Therefore, it is necessary to examine how the provision governing such sale should be. While the Civil Code established appropriate rules assuming a certain society, it is necessary to review such rules in order to check whether they conform to modern social situation.
- When an urgent law reform is necessary, it is inevitable to conduct the deliberation under various limitations. Therefore, it is necessary to have discussion aiming to make the Civil Code correspond to social changes and easily understandable investing certain period of time in an opportunity with no such limitations.
- While there are practically unreasonable contents in a part of provisions in the Commercial Code (law of commercial transaction), it is possible that the Civil Code has the same problem. It is important from the view of practice to examine whether individual default rules in the Civil Code (relating law of obligations) have reasonableness as a “default rule.”

(Necessity to review the whole)

- There are questions on the Civil Code (law of obligations) reform this time that what kind of problems need to be solved urgently, why the whole reform, not the reform of individual problematic provisions, is going to be conducted, and what kind of principle is the basis for the reform.
- For example, while it is an important issue whether the provision of false representation under the Consumer Contract Act should become a general provision in the Civil Code, if it should, it would be necessary to pay due consideration to make the whole provisions consistent and easy to use by reviewing all provisions on manifestation of intent related to misrepresentation. Like this, it is necessary to conduct deliberation for the Civil Code reform not only focusing on necessity of reforming particular provisions but also overlooking the whole.
- While it is unobjectionable that the provision of assumption of risk for the sale of a specific thing (Article 534 of the Civil Code) is unreasonable, in reforming this provision, it is necessary to review the whole structure in order to ensure consistency because the reform influences various systems on default such as cancellation. Although it is necessary to start discussion from the part which needs to be reformed, it may be

inevitable that such discussion leads to the whole reform in the end.

- In working with urgent legislative issues in the past, the focus of the discussion has been limited to the main part without paying attention to peripheral issues. Then, when do we reform such non-urgent problems? As of this moment that over a hundred years have passed since legislation of the Civil Code, it is necessary to review the whole provisions as a maintenance for the next fifty or hundred years.

(The principle of the reform)

- ◇ In reforming the Civil Code (law of obligations), if we initiate deliberation on individual issues to be reformed without discussing the direction and principles of the reform at all, that would be “a voyage without a chart.” It would be necessary to explain to the public on the basic idea shared for the discussion about, for example, how to adjust the relationship between the static security of individual property and the dynamic security of transaction.
- ◇ For example, it would be beneficial to deepen the discussion on the leading principle for deliberating the reform by discussing the contents to be included in the articles that state an objective of legislation.
- Although it is undeniable that the principle for reforming the whole provisions is important, it may be beneficial to discuss it at the situation that the underlying principle of the reform becomes at issue in deliberating an individual issue rather than discussing it abstractly at this moment. In addition, it may be possible that a principle of the reform which is consistent in the whole flows from accumulation of the discussions of individual issues.
- It is difficult to find common ground even if we abstractly discuss what the principle of the reform is at this moment. We cannot move forward even if we discuss principles such as the image of the man in the Civil Code or respect for agreements right now. It is enough that we start discussion without paying too much attention to “the Basic Policy for the Law of Obligation Reform” (draft proposals presented by Japanese Civil Code (law of obligation) Reform Commission), for it is confirmed that the deliberation at this Working Group starts from zero.
- The indication that the principle of the reform needs to be clarified may also mean the indication that we need to conduct deliberation paying due consideration to philosophical consistency in individual discussions such as treatment of provisions in the Consumer Contract Act or what kind of basic stance should be taken in issues relating to impediments to performance or manifestation of intent.
- ◇ While there are principles of the Civil Code such as security of transactions, fairness, and freedom of contract, concrete meaning of these terms depend on the person. Thus, it is difficult to achieve an agreement as to the principle of the reform abstractly. There is no choice but to advance discussion in deliberation of individual articles.

- ◇ It is necessary to have discussion on the basic principle of the reform, and it may be a good idea, after completing deliberation on concrete issues, to approximate ideas at a certain stage and orchestrate them in the end. However, it is difficult to form a common image of the basic principle even if we start discussion in the beginning.
- ◇ The view on contract in western society which is composed of various people with different religious and social background values an agreement between parties. On the other hand, the view on contract in Japanese society expects to form an agreement in rhythmic breathing and the culture of shame. These views are different. It may be a dangerous idea if Japanese Civil Code reform is advanced in the direction of putting more value on parties' agreement based on the western idea.
- ◇ Respect of agreements does not necessarily mean to value the language written in the contract. Rather, what is important is to examine what "agreement" should be legally respected. In addition, respect of agreements may involve the implication that what cannot be evaluated as a genuine agreement is denied its effect.
- ◇ It is necessary to make the Civil Code that clearly states in a provision that respect of agreements does not necessarily mean valuing the formal language of the contract.
- ◇ Even though respect of agreements is emphasized, it is not uncommon in practice that the parties did not think about the issue to be disputed later. It is necessary to have a principle of the Civil Code which can be a guideline for resolution in such situation. In addition, it is necessary to advance discussion paying due consideration on the fact that there are many parties whose behavior or decisions are difficult to be reasonably explained.
- ◇ When we deny an effect of a formal agreement, there are various thoughts and principles supporting such decision. Therefore, it is necessary to have discussions on that level of principles even if reaching an agreement is difficult. However, such discussion should be deepened in the context of concrete issues.
- ◇ Emphasizing the particularities of Japanese or Japanese society supports certain stance without awareness, and thus it is important to relativize such stance. As to the view on contract, it is important to pursue well-balanced expression in the articles premising that there are various ideas included.
- ◇ In modern society, the Civil Code regulates legal relationship of persons with various values and contractual awareness. If rules were made based on one principle, such rules may be adoptable to only one part of Japanese society. For example, in relation between contractual freedom and contractual fairness, it is required to pay attention to both sides and balance the respective values.
- ◇ Supposing that there are two models of contract – one does not provide details based on trust and faith and the other provides allocation of detailed risks in depth, what kind of rules can we assume as the Civil Code rules which are universally applicable to both models of contract?

- ◇ Even today, in case of a dispute arising in a matter not provided in the contract, the dispute resolution is taken in a manner that, if the parties cannot resolve the dispute by negotiation, the agreement of the parties is first explored, then when such agreement is not found, a third party makes a decision on what the agreement is.
- ◇ Even when a term on certain obligation is not written in a contract, existence or non-existence of the agreement on that obligation can vary depending on attribution and relationship of the parties. The current Civil Code has been able to respond to transactions between businesses or between citizens through interpretation of obligation. It is difficult to imagine that establishing new articles bars such operation.
- ◇ Among what is discussed as respect of parties' agreements, some relate to reasonable interpretation of a contract or recognition of an agreement. These matters are not necessarily suitable to be made in the letter of the law, and may be treated based on individual cases even in the future.

2. Points to remember for the Civil Code (law of obligations) reform

(General points to remember)

- It is necessary to conduct deliberation paying attention to what kind of Civil Code is necessary as the Civil Code over the next fifty years or for the society for fifty years ahead.
- This reform will become not the solution for present concrete problems but the guideline of the future society. Therefore, it is necessary to have discussion sufficiently as to the point that to which direction we are going to direct the future society.
- In conducting the reform, it is necessary to have the point of view that the reform should not impede development and innovation of capitalist economy.
- It is necessary to have discussion making clear distinction between the reform based on the view of putting case law theories in the statutory form or fixing provisional expression and the reform based on the view of policy. As to the latter political reform, it may be necessary to advance discussion carefully with sufficient consideration of its necessity and social impacts.
- ◇ Although the necessity to modernize the Civil Code is undeniable in order to properly correspond to social and economic changes according to the development of market globalization, the limitation of so-called new liberalism is coming to appear in the drastic transformation of social environment after the Lehman Shock. It is necessary to advance discussion paying attention to this limitation.
- While it is necessary to modernize the Civil Code in order to adequately correspond to social and economic changes accompanied by development of market globalization, it is necessary to advance discussion carefully because it is the time that national consensus is hard to be reached upon the recent rapid change of social environment.

- It is necessary to advance discussion in consideration of continuity with the present Civil Code and legal stability at all times.
- In light of the fact that the present Civil Code is firmly in place in society, we should not alter the fundamental rules as to the part of provisions which do not necessarily need to be reformed even if such alteration is theoretically correct.
- In discussing policy issues, it is necessary to have discussion bearing in mind where the adequate place to make such policy decision is.
- ◇ There is no problem supporting new liberalism or an idea on Japanese view on contract as a personal principle. However, if the leading principle of the Working Group is decided based on these principles, it would be contradict with the essential purpose of the Working Group that various opinions serve to produce a good draft. It is not necessary to unify the underlying thoughts, for there is a possibility that a person who supports new liberalism and a person who does not can agree on a specific proposal of an article.

(Relationship with international transaction rules)

- International transaction is very active today. If Japan adopts transaction rules which are different from other countries, that becomes an obstacle of transaction. Therefore, we should not disregard harmonization with the transaction rules of these other countries.
- Together with further development of economic globalization, it is necessary to conduct deliberation, taking a panoramic view on Japanese economy as a whole, with the point of view that the reform should not impede economic transaction both domestically and internationally.
- As to international transaction rules, many parts are discussed from the point of view that what kind of civil substantive rules are preferable in the modern society. Such discussion serves as useful reference for discussing how domestic transaction and contract should be. Thus, if we write off such discussion on the mere ground that they are for international transaction rules, our deliberation may lose an important point of view in examining an ideal framework of future Japanese Civil Code.
- While the view on harmonization with international transaction rules is also necessary, the Civil Code is the general rule widely applied to sales or services contract among individuals performed in various regions in Japan. Therefore, it is necessary to conduct deliberation assuming various situations to which the Code is applied.
- While it is desirable to become so in the end, harmonization with international transaction rules should not be an objective from the beginning.

(Method for deliberation)

- It may be useful to have discussion dividing individual issues which are the subject of deliberation into the following three groups: the reform to put case law theories into the

statutory form; the reform to alter practice based on policy; and the reform to fix the wording of provisions without altering the meaning.

- Provisions relating to law of obligations contain various themes which have different characteristics. Thus, we should not stick to submitting the recommendation in a lump. We should advance deliberation separating the themes to be discussed in other opportunity and classifying the themes to be discussed earlier and later.
- In order to genuinely make the Civil Code reform of the people and by the people, we should have an opportunity to seek public opinion widely.
- It is necessary to show the whole picture of the deliberation widely to the public and ask public opinions including the issue on the principle of the reform and legal technical issues of fixing the wording of provisions. As to the opportunity to ask for public comments, we should set such opportunity not once, but several times.